APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

NO. 20-3253

DAVID MINNICK,

Petitioner-Appellant,

v.

DAN WINKLESKI, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 19-CV-33—**William E. Duffin**, *Magistrate Judge*.

ARGUED MAY 12, 2021—DECIDED SEPTEMBER 21, 2021

Before FLAUM, HAMILTON, and BRENNAN, *Circuit Judges*.

BRENNAN, *Circuit Judge*. David Minnick pleaded no contest in Wisconsin state court to several crimes that resulted from a violent confrontation involving his then-wife. He received sentences totaling 27 years of initial confinement. Since then, Minnick has brought a

series of unsuccessful challenges to his convictions in state and federal courts.

The district court denied Minnick's request for federal habeas relief under 28 U.S.C. § 2254. That court decided that Minnick's trial counsel was not ineffective for advising him that a term of not more than ten years of initial confinement was likely. The court also ruled that Minnick did not show that any reasonable trial counsel would have advised him of the possibility of withdrawing his no contest pleas before sentencing. So not offering that argument did not deny Minnick the right to effective postconviction counsel.

Although Minnick's claims could have been analyzed differently—including whether the state court's decision on his trial counsel's sentencing advice warranted deference under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254—the correct result was reached. We affirm the denial of habeas relief.

I

When David Minnick's wife told him she was leaving him for another man, Minnick retrieved a rifle and struck her in the head. She fled to her parents' house across the street, and Minnick followed, firing several shots. He tried to break down the door of his in-laws' house, broke windows, and shot inside the house, grazing his father-in-law. As a result, Minnick was charged in Kenosha County Circuit Court with aggravated battery, attempted first-degree murder, and several counts

of first-degree reckless endangerment and attempted burglary, all while using a dangerous weapon.

Minnick initially pleaded not guilty by reason of mental disease or defect, arguing that his actions were rooted in the post-traumatic stress disorder from which he suffers. He later withdrew that plea and agreed to plead no contest to the crimes (except for the attempted murder charge, which was dismissed and read-in) and leave sentencing up to the court. This exposed Minnick to 73 years of initial confinement.[1] The presentence investigation report recommended Minnick receive between 16 and 22½ years of initial confinement. At the sentencing hearing, the state asked for 45 years of initial confinement, and Minnick's trial counsel, Laura Walker, asked for 4 years. The trial court sentenced Minnick to 27 years of initial confinement followed by 14 years of extended supervision.

Minnick appealed that sentence, arguing (by his postconviction counsel Michael Zell) that he should be able to withdraw his no contest pleas because he received ineffective assistance of counsel. An attorney is constitutionally ineffective if she performs deficiently and this performance prejudices her client. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Minnick argued Walker met this standard because she

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[1] Under Wisconsin's determinate criminal sentencing structure, a bifurcated sentence consists of an initial term of confinement in prison followed by a term of extended supervision in the community. *See* Wis. Stat. 973.01(2); Thomas J. Hammer, *The Long and Arduous Journey to Truth-in-Sentencing in Wisconsin*, 15 FED. SENT'G REP. 15 (2002).

improperly guaranteed and unreasonably estimated that he would receive a much shorter sentence.

The state trial court held a hearing at which Minnick and Walker testified.[2] The court found Walker credible that she did not guarantee Minnick a certain sentence length, and that Minnick knew Walker provided only an estimate. At the hearing, a friend of Minnick's also testified he had spoken with Walker, who asked the friend to convince Minnick to take the plea. Walker responded in her testimony that Minnick knew his sentence was ultimately up to the judge and that she always qualified her statements to Minnick about the length of his sentence by emphasizing that her estimate was not a guarantee. The state court ruled against Minnick and declined to let him withdraw his no contest pleas.

The Wisconsin Court of Appeals affirmed this decision in 2015. That court ruled: "Minnick has shown no more than that counsel predicted an outcome that did not come to pass. Her misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim, ..." The Wisconsin Supreme Court and the Supreme Court of the United States denied review.

Minnick then filed a collateral attack in state court under Wis. Stat. § 974.06, alleging that Walker

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[2] In Wisconsin's postconviction process, an offender's initial step in challenging a sentence is a postconviction motion filed under Wis. Stat. § 974.02, which allows the trial court the first opportunity to consider certain challenges. *See Page v. Frank*, 343 F.3d 901, 905–06 (7th Cir. 2003).

was constitutionally ineffective because she failed to advise him that he could withdraw his no contest pleas before sentencing if he provided a "fair and just reason." Because Minnick had not raised this claim in his first appeal, he argued the state court could consider it because his postconviction counsel Zell was constitutionally ineffective for not raising it. When Walker learned that the presentence investigation report recommended a sentencing range exceeding what she had advised, Minnick argued, she should have informed him that he could have moved to withdraw his no contest pleas.[3]

For habeas petitioners who allege they received ineffective assistance of postconviction counsel because an issue was not raised, Wisconsin employs a "clearly stronger" standard to evaluate counsel's performance under *Strickland*. *See State v. Romero-Georgana*, 849 N.W.2d 668, 672, 679 (Wis. 2014) (citing *State v. Starks*, 833 N.W.2d 146 (Wis. 2013)). Under that standard, "the defendant must show that a particular nonfrivolous issue was *clearly stronger* than issues that counsel did present." *Starks*, 833 N.W.2d at 163 (internal quotation marks omitted).

The state court held a hearing on Minnick's motion. Zell testified that the claim he raised about Walker's sentence estimate was stronger than arguing

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[3] Under Wisconsin law, a presentencing plea withdrawal motion is considered under a "fair and just reason" standard, *State v. Jenkins*, 736 N.W.2d 24, 33 (Wis. 2007), while such a motion made after sentencing plea is evaluated under a "manifest injustice" standard. *State v. Negrete*, 819 N.W.2d 749, 755 (Wis. 2012).

Walker was ineffective for not advising Minnick about presentence plea withdrawal. Zell explained that witnesses could testify about Walker's advice to Minnick about the likely sentence. In contrast, given the record, Zell had concerns that a plea withdrawal motion was not well-founded. The state court agreed and denied this motion.

In 2018 Minnick appealed that denial to the Wisconsin Court of Appeals. That court noted how Minnick's appeal was premised on the same scenario it had rejected three years earlier that Walker's misjudgment of a likely sentence was a basis for an ineffective assistance of counsel claim. The appeals court concluded that Zell had not performed deficiently, ruling that the plea withdrawal argument was not clearly stronger than the argument Zell offered. Zell was aware of the law underlying a plea withdrawal motion, and more factors favored the claim Zell made that Walker had misled Minnick concerning his possible sentence than supported an ineffectiveness claim that Walker failed to counsel Minnick to withdraw his pleas before sentencing. Minnick also was not prejudiced, the appeals court ruled, because sentencing was at the discretion of the trial judge and the presentence investigation report did not alter that. The Wisconsin Supreme Court denied review of Minnick's collateral attack.

Minnick then filed this federal habeas corpus petition under 28 U.S.C. § 2254. His petition alleged:

1. Walker was ineffective for saying that if Minnick accepted the plea deal, he would

receive only ten years of initial confinement;

2. Walker was ineffective for not advising Minnick that he could withdraw his plea before sentencing; and

3. Zell was ineffective for not making the plea withdrawal argument in Minnick's first appeal.

On the first claim, the district court concluded that Minnick did not make this argument in the state court of appeals, so it could be considered only because the state conceded that Minnick met the exhaustion requirement for habeas petitions. This led the district court to conclude that the Wisconsin Court of Appeals had not adjudicated the first claim on the merits, and that as a result, its decision was not entitled to deference under AEDPA. Even under de novo review, though, the district court denied the first claim because Walker had not shown bad faith, her estimate was not inconsistent with other cases, and there was no suggestion that her estimate was a gross misjudgment.

The district court reviewed the second claim through the lens of ineffective assistance of appellate counsel. But, inscrutably, that court determined the government had waived any argument that Minnick had procedurally defaulted this second claim. So the district court essentially analyzed Minnick's second and third claims together. On these claims, the district court concluded that AEDPA deference applied

because the Wisconsin Court of Appeals adjudicated the ineffective assistance of postconviction counsel claim on the merits. According to the district court, Minnick could not have been prejudiced by postconviction counsel's failure because Minnick could not show he would have moved to withdraw his pleas, or that he would have succeeded in withdrawing his plea if he had been advised to do so.

So the district court denied Minnick's petition, but it issued a certificate of appealability on two issues: whether Minnick was denied effective assistance of counsel based on Walker's sentence estimate, and by Zell's failure to make the plea withdrawal argument.

II

We first examine whether Minnick is entitled to habeas relief for his claim that his trial counsel Walker was constitutionally ineffective when she told Minnick he was "likely" to receive no more than ten years of initial confinement. The district court answered this question in the negative. We review that determination, as we do all the district court's decisions on Minnick's petition, de novo. *Maier v. Smith*, 912 F.3d 1064, 1069 (7th Cir. 2019).

A

On this first claim, the district court concluded that the deferential standard of AEDPA does not apply. A threshold question is whether that decision is

correct. AEDPA deference applies only to claims in habeas petitions that were adjudicated on the merits in state court. *Adorno v. Melvin*, 876 F.3d 917, 921 (7th Cir. 2017). We presume a state court adjudicated a claim on the merits unless the state court relied wholly on state law grounds for its decision or expressly declined to consider the claim. *Winfield v. Dorethy*, 871 F.3d 555, 560 (7th Cir. 2017).

The district court construed Minnick's claim in the state court that he was "guaranteed" a certain sentence as different from his first claim here that Walker's advice as to the likely sentence constituted ineffective assistance. If Minnick's claim was not presented to the state court—as the district court believed—it could not have been adjudicated on the merits, as required for AEDPA deference. *Winfield*, 871 F.3d at 560. Generally, a claim not raised in the state appellate court would be an unexhausted claim that a district court could not consider on collateral review. *See* 28 U.S.C. § 2254. But according to the district court, because the state conceded that there was no exhaustion issue, the district court had to consider this claim so it conducted de novo review.

We do not agree with the district court that the Wisconsin Court of Appeals did not adjudicate Minnick's first claim on the merits. The state appeals court not only concluded that Walker did not make a guarantee to Minnick about the length of his sentence, but it expressly ruled that Walker's misjudgment of the likely sentence was not ineffective assistance of counsel. For the purpose of habeas review, there is no

functional distinction between Minnick complaining about a "guarantee" and about "advice." Walker offered her opinion about what sentence Minnick would receive. However her opinion is characterized—a "guarantee," a "likely outcome," an "estimate," or a "prediction"—it was her counsel to Minnick, which the Wisconsin Court of Appeals ruled was not ineffective.

The state appeals court did not rely wholly on state law grounds for its decision or expressly decline to consider the claim, so the presumption of adjudication on the merits controls. We conclude that AEDPA deference applies to the Wisconsin Court of Appeals' resolution on Minnick's first claim.

B

Resolving this threshold question leads us to recall what AEDPA deference means. Minnick's appeal comes to us as a collateral attack on a state court judgment. Under AEDPA's strict standard of review, federal courts defer to state court decisions. By its text, AEDPA precludes a federal court from granting a state prisoner's habeas petition unless the state court's merits adjudication "resulted in a decision that was *contrary to*, or involved an *unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphases added). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction

through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). This standard is "difficult to meet and highly deferential." *Makiel v. Butler*, 782 F.3d 882, 896 (7th Cir. 2015) (internal quotation marks omitted). Relief is precluded "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (internal quotation marks omitted).

AEDPA's strictness is grounded in comity. "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). "AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *Woods v. Donald*, 575 U.S. 312, 316 (2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods*, 575 U.S. at 316. This is particularly true when state courts adjudicate ineffective assistance of counsel claims. *Titlow*, 571 U.S. at 19.

For an ineffective assistance of counsel claim such as this, "[t]he federal courts as a whole engage in 'doubly deferential' review" under AEDPA. *Wilborn v. Jones*, 964 F.3d 618, 620 (7th Cir. 2020) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Deference is layered upon deference in these cases

because federal courts must give "both the state court and the defense attorney the benefit of the doubt." *Titlow*, 571 U.S. at 15. Even without AEDPA, ineffective assistance of counsel claims remain difficult to prove, as "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "That hill is even steeper" for claims governed by AEDPA. *Myers v. Neal*, 975 F.3d 611, 620 (7th Cir. 2020).

A claim for constitutionally ineffective assistance of counsel during the plea process is governed by the *Strickland* standard. *See Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012). To be deficient, counsel's performance must be unreasonable such that "counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687 (internal quotation marks omitted). In the plea-bargaining context, the prejudice prong is satisfied if "there is a reasonable probability that, but for counsel's errors, the [petitioner] would not have pleaded guilty and would have insisted on going to trial." *Lafler* 566 U.S. at 163 (internal quotation marks omitted). There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* 466 U.S. at 689.

C

A petitioner's habeas claim is considered against the last reasoned state court decision on the merits.

Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018); *Makiel* 782 F.3d at 896. For this first claim, that is the 2015 decision of the Wisconsin Court of Appeals on direct appeal. That court rested its analysis on the deficient performance prong of *Strickland*, so we confine our analysis to that prong.

Minnick argues that by applying a categorical rule, the reasoning of the Wisconsin Court of Appeals was contrary to *Strickland*. According to Minnick, this rule was that an attorney's sentence miscalculations could never result in constitutionally deficient performance. True, the Supreme Court has instructed that *Strickland* requires a "circumstance-specific reasonableness inquiry," *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). But the reasoning of the Wisconsin Court of Appeals was very similar to the standard this court has applied in analogous cases, and which we do not read as a categorical rule. This court has stated that "a mistaken prediction is not enough in itself to show deficient performance" because "the sentencing consequences of guilty pleas (or, for that matter, guilty verdicts) are extraordinarily difficult to predict." *United States v. Barnes*, 83 F.3d 934, 940 (7th Cir. 1996); *see also Bridgeman v. United States*, 229 F.3d 589, 592 (7th Cir. 2000) ("[C]ounsel's alleged miscalculation, standing alone, could never suffice to demonstrate deficient performance unless 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."). Still, a miscalculation might constitute deficient performance if it is a gross miscalculation and

there is evidence of the attorney's bad faith. *Id.*; *see also United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999).

In its 2015 opinion, the Wisconsin appeals court did not include the phrases "in itself" or "standing alone." Even so, its decision can reasonably be interpreted as describing a similar standard. Nothing in Minnick's case required the state appeals court to explain that a miscalculation might be grounds for deficient performance if there was evidence of bad faith. Further, Minnick did not present any evidence—besides the incorrectly estimated sentence—to suggest that Walker performed deficiently.

The Wisconsin Court of Appeals determined that Minnick knew at sentencing that the state court could impose the maximum sentences, as well as that the term of initial confinement which Walker opined Minnick would receive was not a guarantee. Minnick cites Walker's newness to legal practice (two years of experience when she represented Minnick) and the difference between the initial confinement term she estimated and the range in the presentence investigation report (10 years versus 16–22½ years) and contends Walker acted unreasonably in her prediction. But Walker had worked on hundreds of criminal cases before Minnick's, including shooting cases, and the federal district court provided examples of cases in which defendants facing similar charges to Minnick's received sentences that were within the range that Walker predicted. And the state court did not conclude or suggest facts that showed bad faith on Walker's part

in making her prediction. Even more, Walker gave reasons for her prediction in the state court. She believed that because Minnick had no criminal record, was 45 years of age, and was a military veteran that he would receive a sentence far less severe than the maximum.

Although Supreme Court decisions provide the relevant lodestar for cases under AEDPA review, if a state court's reasoning largely follows circuit precedent, that is persuasive evidence the state court did not improperly apply the Supreme Court caselaw. *See Thill v. Richardson*, 996 F.3d 469, 477 (7th Cir. 2021) ("This ambiguity is not enough to demonstrate that the court applied a standard contrary to clearly established federal law.") (internal quotation marks omitted). Because the Wisconsin Court of Appeals' resolution of this case was consistent with this court's precedent, its decision was not contrary to, or an unreasonable application of *Strickland*. What is more, that a sentence miscalculation is not enough by itself to demonstrate deficient performance is consistent with *Strickland*'s presumption of deference to attorneys.

The state appeals court did not unreasonably apply *Strickland* when it concluded that Walker's misjudgment of Minnick's likely sentence length, without more, could not establish deficient performance. Under AEDPA, that decision is due deference. So relief is not available to Minnick on his first claim.

III

A

The district court handled Minnick's second and third claims in tandem. Because the Wisconsin Court of Appeals viewed Minnick's second claim against Walker through the prism of his third claim for ineffective assistance of postconviction counsel, the district court reasoned that it must do so as well. Yet, incongruously, the district court also rejected the argument that Minnick's second claim against Walker was procedurally defaulted, concluding that the government had waived that argument by failing to mention it in its opening brief. That reasoning is contradictory. If Minnick's second claim was not procedurally defaulted, the question is whether the Wisconsin Court Appeals adjudicated that claim on the merits. If, however, this second claim was procedurally defaulted, then only Minnick's third claim for ineffective assistance of postconviction counsel would remain. What cannot be true is that Minnick both did not procedurally default his second claim and that we view it only in the context of his third claim.

We address this contradiction by examining only Minnick's third claim for ineffective assistance of postconviction counsel. Although this is what the district court did as well, we do so for different reasons. The third claim is included in the certificate of appealability, our charge for this appeal. In addition, although the district court concluded that the government waived the procedural default argument, that

court essentially treated Minnick's second claim—that Walker was ineffective for not advising Minnick that he could withdraw his plea before sentencing—as procedurally defaulted by not viewing the claim on its own terms and by granting the certificate of appealability on the third claim. The parties also appear to treat the second claim as procedurally defaulted, and they focus their arguments on the third claim. So we turn to the merits of that third claim.

B

Minnick's claim of ineffective assistance of post-conviction counsel is also subject to the double deference of *Strickland* and AEDPA. *See Shaw v. Wilson*, 721 F.3d 908, 914 (7th Cir. 2013) (*Strickland* standard governs ineffective assistance of appellate counsel). Initially, Minnick argues that the Wisconsin Court of Appeals applied the wrong standard when it limited its deficiency inquiry to whether the claim Zell failed to press was clearly stronger than the argument he raised. Per Minnick, that standard applies only to post-conviction counsel's intentional decisions, not oversight, which Minnick submits was the case here based on Zell's testimony.

Nevertheless, the Supreme Court and this court employ that same standard. *See Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("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."); *Ramirez v. Tegels*,

963 F.3d 604, 613 (7th Cir. 2020) (noting that if an attorney "abandoned a nonfrivolous claim that was both 'obvious' and 'clearly stronger' than the claim[s] that [s]he actually presented, [her] performance was deficient, unless [her] choice had a strategic justification"); *Makiel*, 782 F.3d at 898. These authorities do not admit of the distinction Minnick advances between intent and negligence in postconviction counsel's decision making. *See id.* (at evidentiary hearing appellate counsel "testified that she could not remember specifically considering and rejecting these issues.") (internal quotation marks omitted). As the district court recognized, the clearly stronger standard does not impermissibly add to the *Strickland* test, but instead applies the deficiency prong in the appellate context where counsel is encouraged to winnow the issues selected for appeal. By applying the clearly stronger standard, the Wisconsin Court of Appeals did not apply a test that was contrary to clearly established law. Because the state appeals court properly applied this standard, we limit our analysis to the deficient performance prong of the *Strickland* evaluation.

"[P]roving that an unraised claim is clearly stronger than a claim that was raised is generally difficult 'because the comparative strength of two claims is usually debatable.' " *Makiel*, 782 F.3d at 898. The Wisconsin Court of Appeals concluded that the unraised plea withdrawal claim was not clearly stronger than the challenge to Walker's advice on Minnick's likely sentence, giving two reasons. The first was its evaluation of the underlying claim on Walker's

sentencing advice. The second was Zell's understanding that Minnick would have difficulty showing he had a "fair and just reason" for withdrawing his plea before sentencing. *See State v. Jenkins*, 736 N.W.2d 24, 33 (Wis. 2007) (applying "fair and just reason" standard to plea withdrawals before sentencing). Under Zell's reasoning, Walker did not perform deficiently in failing to advise Minnick to file such a motion. To the contrary, Minnick would simply be expressing a desire to go to trial, which Wisconsin precedent says does not qualify as such a fair and just reason. *See State v. Garcia*, 532 N.W.2d 111, 117 (Wis. 1995) ("A fair and just reason is some adequate reason for defendant's change of heart . . . other than the desire to have a trial.") (internal quotation marks omitted).

Minnick does not directly confront either of these reasons. Rather, he contends his case is akin to those in which counsel fail to consult their criminal defense client about the possibility of taking an appeal. But in those decisions, the strength of the underlying claim is not the main consideration; instead "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480.

We are not persuaded by Minnick's analogy to an attorney failing to enter a notice of appeal. There, the

proceedings end if the defendant does not take an appeal; nothing is left for the trial court to do. Here, the only change in circumstances Minnick suggests should have triggered Walker's duty to advise him to withdraw his pleas was the distribution of the presentence investigation report. But such a report does not bind the sentencing court. Everyone knew the latitude at sentencing afforded to the prosecution—and, more importantly, to the court—and Minnick confirmed this when he entered his no contest pleas. Moreover, in instances too numerous to count, a presentence investigation report recommends a sentence longer than the term the sentencing court imposes. Under Minnick's argument, if a presentence investigation report or the possibility of a lengthy sentence is sufficient basis to withdraw a plea, that would invite substantial gamesmanship.

Minnick also argues that the unraised plea withdrawal claim was clearly stronger than Zell's challenge to Walker's advice on Minnick's likely sentence because a presentencing plea withdrawal motion is reviewed under a more deferential standard than if made after sentencing. But just because the standards differ based on the timing of the motion does not suggest which ineffective assistance of counsel claim is stronger. What matters is whether Walker, when the motion had to be made, acted reasonably in not advising Minnick to make it. As noted above, there are reasons to conclude Walker acted within the scope of competent counsel in not advising Minnick to so move.

It is not clear that any presentence plea withdrawal motion that Minnick made would have succeeded. At most, it is debatable whether such a motion is clearly stronger than the sentencing advice argument Zell advanced. This case is not like *Shaw*, in which an essentially frivolous sufficiency-of-the-evidence claim was raised, rather than counsel pressing a potentially meritorious statutory claim. *Shaw*, 721 F.3d at 915. The state appeals court could reasonably conclude that Walker would not think there was a fair and just reason for Minnick to withdraw his no contest pleas at that stage of the proceedings. No Wisconsin authority expressly holds that this circumstance constitutes a fair and just reason to withdraw a plea. That renders weaker the unmade claim. Because it is debatable whether the unraised claim was clearly stronger, the state appeals court's conclusion cannot be unreasonable.

Whether he would have succeeded in withdrawing his pleas is beside the point, Minnick maintains, because he was denied legal process. But at sentencing, the state court was not bound by any previous recommendations, and Minnick could argue that his sentence should be lower than the state or presentence investigation report recommended. Minnick admits he was fully aware that the state court had full sentencing discretion and that the ultimate disposition was up to the court. These facts all suggest that the claim attorney Zell raised on the sentencing advice was arguably stronger than an unraised plea withdrawal request.

The Wisconsin Court of Appeals did not unreasonably apply the *Strickland* deficient-performance prong when it concluded that a plea withdrawal claim was not clearly stronger than the argument that his postconviction counsel advanced. That decision is due the further deference of AEDPA. For these reasons, Minnick was not incorrectly denied relief on this claim.

* * *

Minnick's postconviction claims fall short, even more so given the deferential AEDPA standard. Accordingly, we AFFIRM the judgment of the district court denying his request for habeas relief.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

September 21, 2021

Before
JOEL M. FLAUM, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-3253	DAVID MINNICK, Petitioner - Appellant v. DAN WINKLESKI, Warden, Respondent - Appellee
Originating Case Information:	
District Court No: 2:19-cv-00033-WED Eastern District of Wisconsin Magistrate Judge William E. Duffin	

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DAVID MINNICK,

Petitioner,

v. Case No. 19-CV-33

DAN WINKLESKI[1],

Respondent.

DECISION AND ORDER DENYING
PETITION FOR A WRIT OF HABEAS CORPUS

(Filed Oct. 20, 2020)

1. Facts and Procedural History

After returning from work on November 15, 2010, David Minnick received a call from an apartment manager. (ECF No. 13-2 at 4.) The manager was looking to speak to Minnick's wife and said he had an apartment to show her. (ECF No. 13-2 at 4.) This was how Minnick learned that his wife was leaving him.

[1] Minnick is incarcerated at the New Lisbon Correctional Institution. *See* https://appsdoc.wi.gov/ (last visited October 20, 2020). The warden of the institution is Dan Winkleski. *See* https://doc.wi.gov/Pages/OffenderInformation/AdultInstitutions/NewLisbonCorrectionalInstitution.aspx (last visited October 20, 2020). In accordance with Rule 2(a) of the Rules Governing Section 2254 Cases and Fed. R. Civ. P. 25(d), the caption is updated accordingly.

When his wife returned home, they talked. She said she was in love with another man and was moving in with him. (ECF No. 13-2 at 4.) The conversation was long. (ECF No. 13-2 at 5.) Minnick was drinking, but they both were calm. (ECF No. 13-2 at 5.) Minnick would periodically go to the basement to get beer (ECF No. 13-2 at 5) and on one of these trips to the basement he retrieved his rifle. (ECF No. 13-2 at 5-6.) Without saying anything (ECF No. 13-2 at 5-6), he pointed the rifle at his wife's face (ECF No. 12-2 at 28). She tried to duck under the table, and Minnick struck her in the head with the butt of the rifle. (ECF Nos. 12-2 at 28; 13-2 at 5-6.)

When she fled from their home on foot, Minnick followed her, firing his rifle. (ECF No. 12-5, ¶ 2.) She made it to her parents' house across the street, where Minnick broke out windows, attempted to break down the door, and repeatedly fired into the residence, grazing his father-in-law with a bullet. (ECF No. 12-5, ¶ 2.) Minnick returned to his home, and, after he refused law enforcement demands that he come outside, a sheriff's department tactical team eventually forcibly entered his home and arrested him. (ECF No. 12-2 at 29.)

"Minnick was charged with aggravated battery, attempted first-degree intentional homicide, four counts of first-degree reckless endangerment, and attempted burglary, all by use of a dangerous weapon, and with endangering safety by reckless use of a firearm." (ECF No. 12-5, ¶ 3.) He initially pled not guilty by reason of insanity (NGI), attributing his crimes to his

post-traumatic stress disorder (PTSD). But after his attorney, Laura Walker, allegedly assured him that he would receive no more than ten years in prison (ECF No. 12-5, ¶ 8), Minnick withdrew his NGI plea and pled no contest in exchange for the attempted homicide charge being dismissed but read in (ECF No. 12-5, ¶ 3). Notwithstanding Walker's prediction, "[t]he court imposed a forty-one-year sentence: twenty-seven years' initial confinement and fourteen years' extended supervision." (ECF No. 12-5, ¶ 4; *see also* ECF No. 12-1.)

Following sentencing Minnick attempted to withdraw his plea on the ground that it was not knowing, intelligent, and voluntary because it was based on his attorney's assurances that his sentence would be no more than ten years. (ECF No. 12-5, ¶ 5.) At a post-conviction hearing Walker acknowledged that she told Minnick that he would likely receive six to ten years in prison and that the sentences would probably be concurrent. (ECF No. 12-5, ¶ 8.) But she insisted that any estimate she gives a client is always with the caveat that the sentence is ultimately up to the judge. (ECF No. 12-5, ¶ 8.)

The trial court found credible Walker's testimony that she did not give Minnick an unequivocal guarantee of his sentence. (ECF No. 12-5, ¶ 13.) On appeal the court of appeals concluded:

> Minnick has shown no more than that counsel predicted an outcome that did not come to pass. Her misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim, *see State v. Provo*, 2004 WI App

> 97, ,¶18, 272 Wis. 2d. 837, 681 N.W.2d 272, and Minnick's "disappointment in the eventual punishment imposed is no ground for withdrawal of a guilty plea," *see State v. Booth*, 142 Wis. 2d 232,237,418 N.W.2d 20 (Ct. App. 1987).

(ECF No. 12-5, ¶ 14); *State v. Minnick*, 2015 WI App 58, ¶ 13, 364 Wis. 2d 527, 868 N.W.2d 198, 2015 Wisc. App. LEXIS 417.

Minnick then filed a motion for post-conviction relief pursuant to Wis. Stat. § 974.06 wherein he argued that his appellate counsel[2] was ineffective for not arguing that Walker was ineffective for not advising him that, if he could demonstrate a fair and just reason for withdrawing his plea, he could do so prior to sentencing. In an unpublished per curiam decision, the court of appeals concluded that appellate counsel was not ineffective for failing to raise this argument because the new argument was not clearly stronger than the arguments he did raise. *State v. Minnick*, 2019 WI App 1, ¶ 13, 385 Wis. 2d 211, 923 N.W.2d 169, 2018 Wisc. App. LEXIS 892.

Minnick then filed the present petition. (ECF No. 1.) He argues that Walker was ineffective by advising

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[2] Under the nomenclature adopted by Wisconsin courts, counsel was "post-conviction" counsel. *See State v. Starks*, 2013 WI 69, ¶4, 349 Wis. 2d 274, 281, 833 N.W.2d 146, 150 (discussing the difference between appellate and post-conviction counsel). The court refers to counsel as appellate counsel to avoid confusion with counsel assisting a defendant in a collateral proceeding, for which there is no constitutional right to effective assistance. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)

him that he would receive a sentence of no more than ten years (ECF No. 1-1 at 7-8) and by failing to advise him that prior to sentencing he could withdraw his plea for fair and just reasons (ECF No. 1-1 at 8-9). He also argues that his appellate counsel was ineffective for not arguing that Walker was ineffective for not telling him he could withdraw his plea before sentencing. (ECF No. 1-1 at 9-10.)

The Honorable J.P. Stadtmueller screened the petition in accordance with Rule 4 of the Rules Governing Section 2254 Cases and ordered the respondent to answer the petition. (ECF No. 7.) The respondent did so. (ECF No. 12.) The case was reassigned to the Honorable David E. Jones following all parties consenting to the full jurisdiction of a magistrate judge (ECF No. 11), and then reassigned to this court following Judge Jones's resignation as a judge. All parties consented to have this court decide the petition. (ECF Nos. 18, 20.)

Minnick has submitted an amended brief in support of his petition (ECF No. 14), the respondent submitted a brief in opposition (ECF No. 22), and Minnick replied (ECF No. 23). The petition is now ready for resolution.

2. Standard of Review

A federal court may consider habeas relief for a petitioner in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a). Following the passage of the Antiterrorism and Effective

Death Penalty Act (AEDPA), a federal court is permitted to grant relief to a state petitioner under 28 U.S.C. § 2254 only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that 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)(2). This is a "stiff burden." *Jean-Paul v. Douma*, 809 F.3d 354, 359 (7th Cir. 2015). "The state court's ruling must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Carter v. Douma*, 796 F.3d 726, 733 (7th Cir. 2015)); *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011).

"Clearly established federal law" refers to a holding "of the United States Supreme Court that existed at the time of the relevant state court adjudication on the merits." *Caffey v. Butler*, 802 F.3d 884, 894 (7th Cir. 2015) (citing *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "A decision is 'contrary to' federal law if the state court applied an incorrect rule—*i.e.*, one that 'contradicts the governing law' established by the Supreme Court—or reached an outcome different from the Supreme Court's conclusion in a case with 'materially indistinguishable' facts." *Id.* (quoting *Williams*, 529 U.S. at 405-06). A decision involves an unreasonable application of federal law if the state court identified the

correct governing principle but applied that principle in a manner with which no reasonable jurist would agree. *Id.*; *see also Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "A court's application of Supreme Court precedent is reasonable as long as it is 'minimally consistent with the facts and circumstances of the case.'" *Williams v. Thurmer*, 561 F.3d 740, 743 (7th Cir. 2009) (quoting *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999)). Thus, a federal court could have the "firm conviction" that a state court's decision was incorrect but, provided that error is not objectively unreasonable, nonetheless be required to deny the petitioner relief. *Lockyer*, 538 U.S. at 75-76.

3. **Analysis**

3.1. **Ineffective Assistance of Trial Counsel**

Claims of ineffective assistance of counsel are governed by the well-established two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hicks v. Hepp*, 871 F.3d 513, 525 (7th Cir. 2017). A petitioner must demonstrate both that his attorney's performance was deficient and that he was prejudiced as a result. *Id.* at 525-26. The first prong "requires that the petitioner demonstrate that counsel's representation fell below an objective standard of reasonableness." *Id.* at 525. "What is objectively reasonable is determined by the prevailing professional norms." *Id.* But there is a wide range of permissible conduct, and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in

the exercise of reasonable professional judgment." *Id.* (quoting *Strickland*, 466 U.S. at 690). The prejudice prong "requires the petitioner to demonstrate a 'reasonable probability that, but for counsel's unprofessional errors,' the outcome would have been different." *Id.* at 526 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009)).

When a claim of ineffective assistance of counsel is presented in a habeas petition, the petitioner faces "a high hurdle." *Hicks*, 871 F.3d at 525. "The Supreme Court has instructed that under these circumstances, [the federal court] must employ a 'doubly deferential' standard, one which 'gives both the state court and the defense attorney the benefit of the doubt.'" *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

"In the context of a guilty plea, a petitioner demonstrates prejudice by 'show[ing] 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.'" *Perrone v. United States*, 889 F.3d 898, 908 (7th Cir. 2018) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Prejudice does not depend on the petitioner being able to prove that, "had he gone to trial, the result of that trial would have been different than the result of the plea bargain." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (internal quotation marks omitted).

In his initial "Postconviction Motion Pursuant to Wisconsin Statutes § 809.30 to Withdraw Guilty Plea" Minnick argued that Walker was ineffective because,

in relevant part, she "guaranteed" and "falsely promised" that he would not receive more than ten years of initial confinement. (ECF No. 13-3 at 6, 7.) Likewise, the "Issue Presented" on Minnick's direct appeal was: "Whether Minnick's attorney's inaccurate guarantee he would receive a sentence of no more than ten years confinement was a manifest injustice when Minnick waived the right to have a mental responsibility trial based on this inaccurate information." (ECF No. 12-2 at 4.) His argument was that he should be allowed to withdraw his plea because Walker had given him a "guarantee" and "assured" him that he would receive no more than ten years of initial confinement. (ECF No. 12-2 at 11-13, 15-16, 20-21.) Minnick argued that the circuit court, relying on an erroneous credibility finding, erred in finding that, rather than a guarantee, Walker offered a mere opinion as to his likely sentence. (ECF No. 12-2 at 15-18.)

Minnick has now abandoned his contention that Walker guaranteed that he would receive no more than ten years of initial confinement. (ECF No. 14 at 10.) He argues in his petition that even giving him an estimate that he would likely receive no more than ten years of initial confinement constituted ineffective assistance. However, the court has not discerned that Minnick made such a claim in his brief to the circuit court or the court of appeals.

Minnick, however, did present such a claim in his petition for review by the Wisconsin Supreme Court. He identified the "Issues Presented for Review" as:

> Whether trial counsel's unreasonable belief and advice that Minnick likely would receive as little as five and no more than 10 years initial confinement should he forgo his right to a trial on charges of shooting at three people denied Minnick the effective assistance of counsel and entitles him to withdraw his resulting no contest pleas.

(ECF No. 12-6 at 3.) He asserted:

> Although raised and argued by Minnick, the circuit court did not address or decide this issue, instead focusing entirely on the included but secondary issue of whether trial counsel "promised" that the sentence would not exceed 10 years initial confinement and concluding that, as a matter of fact, counsel made no such "promise."
>
> The Court of Appeals affirmed on the same grounds, likewise overlooking Minnick's broader claim that, under the circumstances of this case, trial counsel's advice as to the likely sentence was unreasonable and rendered Minnick's resulting no contest pleas invalid.

(ECF No. 12-6 at 3-4.)

As noted, the court has not identified where Minnick made this argument to the court of appeals. Having failed to fairly present his claim to one complete round of review by the state courts, Minnick ordinarily would not be able to present this claim in a federal habeas petition. *See King v. Pfister*, 834 F.3d 808, 815-16

(7th Cir. 2016). However, the respondent does not argue that Minnick procedurally defaulted this claim. In fact, he concedes that Minnick exhausted his state court remedies as to this claim. (ECF No. 12, ¶ 9.)

Notwithstanding the respondent's concession, the court cannot simply overlook the fact that the claim was never presented to the court of appeals. The absence of a state court decision on the merits of Minnick's claim implicates the nature of this court's review. In the absence of a state court decision on the merits, there is no decision to which the federal court owes deference. Thus, the federal court's review is under the *de novo* pre-AEDPA standard. *Cone v. Bell*, 556 U.S. 449, 472 (2009); *Toliver v. Pollard*, 688 F.3d 853, 859 (7th Cir. 2012).

Minnick argues that the pre-AEDPA standard applies, but for different reasons. He argues that this court's review must be under the non-deferential pre-AEDPA standard because the court of appeals misapplied the law when it held that counsel's "misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim, *see State v. Provo*, 2004 WI App 97, ¶ 18, 272 Wis. 2d. 837, 681 N.W.2d 272. . . ." (ECF No. 12-5, ¶ 14.) According to Minnick, rather than assessing ineffective assistance of counsel claims on a case-by-case basis as the Supreme Court has required, the court of appeals categorically dismissed the possibility of relief even when defense counsel's estimate of a likely sentence was itself unreasonable. (ECF No. 14 at 14-15.)

But the court of appeals did not suggest that a defense attorney's inaccurate prediction of a likely sentence can never constitute ineffective assistance. All it said was that, based on the testimony from witnesses at the postconviction hearing, Walker's prediction of the likely sentence was not ineffective assistance. Because Minnick had not argued that Walker was also ineffective for simply having provided an unreasonable estimate of the length of the sentence, the court of appeals did not address the standard applicable to such a claim.

Thus, Minnick's claim that Walker was ineffective for providing an unreasonable estimate as to the length of his likely term of initial confinement is subject to the preAEDPA *de novo* standard of review, although not for the reasons Minnick argues. The pre-AEDPA standard applies because the last court to issue a reasoned decision, the Wisconsin Court of Appeals, did not address the merits of the claim that Minnick now asserts in his habeas petition.

Turning to the merits of Minnick's claim for ineffective assistance of trial counsel, "[w]hen a defendant considers the government's offer of a plea agreement, a reasonably competent counsel will attempt to learn all of the facts of the case and to make an estimate of a likely sentence." *United States v. Barnes*, 83 F.3d 934, 939 (7th Cir. 1996). "It is deficient performance for an attorney to fail to provide good-faith advice about the sentencing consequences of a guilty plea." *Id.* at 939-40.

Every case has its own unique facts and aggravating and mitigating circumstances. Moreover, criminal sentences vary greatly across judges and counties. Thus, "the sentencing consequences of guilty pleas (or, for that matter, guilty verdicts) are extraordinarily difficult to predict." *Barnes*, 83 F.3d at 940. A court's sentencing "discretion is . . . extensive, and predicting the exercise of that discretion is an uncertain art." *Id*. "The attorney need not be 100% correct in her prediction of the consequences of pleading guilty and of going to trial, as a mistake, in and of itself is not proof of deficient performance." *Julian v. Bartley*, 495 F.3d 487, 495 (7th Cir. 2007). "The leeway given counsel stems from the general concept that a court must start with the 'presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Davis v. Lambert*, 388 F.3d 1052, 1059 (7th Cir. 2004)).

"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." *Barnes*, 83 F.3d at 940; *Julian*, 495 F.3d at 495 ("although a mistaken prediction is not sufficient to show deficient performance, in some cases it may be such a gross mischaracterization that it provides a 'strong indication of constitutionally deficient performance.'" (quoting *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999)) (internal citation omitted). "A court may factor the magnitude of the error into its assessment of whether the legal advice was that of a

reasonably competent attorney." *Julian*, 495 F.3d at 495.

In an attempt to show that Walker's estimate was unreasonable Minnick emphasizes Walker's lack of experience. (ECF Nos. 14 at 16; 23 at 4.) She had been a practicing attorney for only about two years and could not recall having previously represented someone who had been charged with attempted first-degree intentional homicide. (ECF No. 12-34 at 11.) However, Walker had handled hundreds of criminal cases, including "cases that are similar to this where someone was actually shot." (ECF No. 12-34 at 11.) In one case the victim had been severely injured and required surgery. (ECF No. 12-34 at 14.) That defendant received six years of initial confinement. (ECF No. 12-34 at 14.)

Minnick does not present any other evidence to support his claim that Walker's estimate was unreasonable. He does not, for example, present a record of factually similar cases where every defendant received significantly more than ten years of initial confinement. Nor does he argue that Walker "did not make a good-faith effort to discover the facts relevant to his sentencing, to analyze those facts in terms of the applicable legal principles and to discuss that analysis with him." *Barnes*, 83 F.3d at 940. Thus, it is unclear how Minnick expects the court to assess the objective reasonableness of Walker's estimate. It appears that Minnick's argument is simply that, as a matter of visceral intuition, the court should hold that there was no way that a ten-year sentence was likely for Minnick.

But it *was* reasonable for Walker to predict that Minnick would be unlikely to receive more than 10 years of initial confinement. Minnick's crimes were serious, but there were significant mitigating factors, including his demonstrated history of PTSD relating to his abusive childhood, his 21 years of service in the Navy, his steady employment record following his discharge from the Navy, and, perhaps most significantly, the fact that, at 45 years of age at the time of sentencing, he had no criminal record.

For comparison, the court notes that another habeas petition was recently before this court where the petitioner was likewise incarcerated for endangering multiple lives by firing shots from a rifle. *Bridges v. Champagne*, No. 18-CV-1247, 2020 U.S. Dist. LEXIS 69149, at *1 (E.D. Wis. Apr. 20, 2020), involved a 43-year-old who "fired as many as 15 rounds from an assault rifle toward a crowd of roughly ten people." *Id.* As here, the incident resulted in relatively minor injuries (although it was unclear who injured that victim). However, unlike Minnick, by the time Bridges was in his early-40's he had amassed a lengthy criminal record, and as a result was prohibited from possessing a firearm. On these facts Bridges received a sentence of seven years of initial confinement. The comparison between the two cases is far from perfect, but on a superficial level it supports the reasonableness of Walker's estimate.

The circuit court's sentence was not within Walker's estimated range, but an estimate is not unreasonable merely because it proves to be inaccurate.

Julian, 495 F.3d at 495. Minnick's claim merely highlights the vagaries of sentencing. The parties' sentencing arguments were worlds apart, with the state recommending a term of initial confinement totaling more than 45 years and Minnick arguing for just four (but privately expecting no more than ten) years. (ECF Nos. 12-32 at 21, 29, 44; 14 at 3.) But, in the context of sentencing, two people may both reasonably believe that a widely divergent outcome is likely.

A sentence of not more than ten years would have been consistent with the relevant sentencing factors, *see State v. Williams*, 2018 WI 59, ¶46, 381 Wis. 2d 661, 691, 912 N.W.2d 373, 387, and it was reasonable to consider such a sentence likely. The fact that a predicted outcome ultimately does not come to pass does not, in hindsight, render that prediction unreasonable. Aside from the fact that courts must resist the urge to second-guess the reasonableness of an attorney's conduct with the aid of hindsight, *see Maryland v. Kulbicki*, 577 U.S. 1, 4 (2015), the court must acknowledge that even unlikely things often occur. Consequently, Walker was not ineffective for having advised Minnick that a sentence of not more than ten years of initial confinement was likely.

3.2. Ineffective Assistance of Appellate Counsel

Minnick argues that, even if it was reasonable for Walker to initially estimate that he likely would receive no more than ten years of initial confinement,

that estimate became unreasonable once the Department of Corrections issued its presentence investigation report and recommended an initial term of confinement of 16 to 22-and-a-half years. He argues that Walker was ineffective for not then advising him that he could withdraw his plea if he could demonstrate a "fair and just reason" for doing so, *see Minnick*, 2019 WI App 1 n.4 (citing *State v. Jenkins*, 2007 WI 96, ¶34, 303 Wis. 2d 157, 736 N.W.2d 24).

Minnick did not raise this claim in his direct appeal. Rather, he raised it for the first time in a motion for post-conviction relief pursuant to Wis. Stat. § 974.06 and in conjunction with a claim of ineffective assistance of appellate counsel. Therefore, the court must likewise consider this claim through the lens of ineffective assistance of appellate counsel.

The respondent argued in his answer

> that this claim is procedurally defaulted because the court of appeals resolved it based on an independent and adequate state procedural rule. Specifically, the court held that the claim was not clearly stronger than the ineffective assistance claim that Minnick raised in his first postconviction motion. Thus, the court held, Minnick could not show that postconviction counsel's ineffectiveness was a sufficient reason under Wis. Stat. § 974.06(4) for his failure to have raised the claim earlier.

(ECF No. 12, ¶ 5.) However, this argument is not raised in the respondent's brief. The respondent

having abandoned the argument, the court does not consider it further.

Minnick again argues that the court must assess his claim under the pre-AEDPA standard. However, the basis for Minnick's argument is unclear. He states:

> The Wisconsin Court of Appeals' conclusion that Walker reasonably concealed the option of seeking presentencing plea withdrawal from Minnick is based on both irrational findings of fact and unreasonable application of controlling Supreme Court authority. As., [sic] because that court's conclusory assertion that Minnick was not prejudiced by Walker's deficient performance is both contrary to and an unreasonable application of the controlling prejudice standard under *Hill*, review of both prongs of the ineffectiveness standard is de novo. 28 U.S.C. §2254(d)(1)&(2).

(ECF No. 14 at 18.) Later he states:

> Significantly, the Court must keep in mind the standard of review here. Minnick is not challenging the denial of a "fair and just reason" motion. The state circuit court did not comment or rule on whether it would have granted such a motion. Instead, it noted the importance to its analysis of the fact that such a motion is subject to a far more lenient standard than the "manifest injustice" standard applied to Zell's motion on the original appeal (R12-36:2-3; R12-37:11, 12). Nor, since there was no evidentiary hearing on this point, did the court below make any factual findings

> subject to deferential review under 28 U.S.C. §2254(e)(1). Review of the underlying "fair and just reason" claim accordingly is *de novo* without deference under the AEDPA. *Panetti*, 511 U.S. at 953-54; *Rompilla*, 545 U.S. at 390.

(ECF No. 14 at 20-21.)

Minnick's assertion that the court of appeals' decision was "both contrary to and an unreasonable application of the controlling prejudice standard . . . " is not a reason to apply the pre-AEDPA standard. That *is* the AEDPA standard. *See* 28 U.S.C. § 2254(d). Further, Minnick's assertion that "the court below [did not] make any factual findings subject to deferential review under 28 U.S.C. §2254(e)(1)" contradicts his earlier assertion that the Wisconsin Court of Appeals' conclusion that Walker reasonably concealed the option of seeking presentencing plea withdrawal from Minnick was based in part on irrational findings of fact. (ECF No. 14 at 18.)

In sum, Minnick has failed to show that the generally applicable AEDPA standard does not apply to the claim that the court of appeals addressed on the merits. Thus, to obtain relief, Minnick must show that the court of appeals' conclusion was contrary to or based on an unreasonable application of federal law or on an unreasonable determination of the facts.

"The general *Strickland* standard governs claims of ineffective assistance of appellate counsel as well as trial counsel but with a special gloss when the challenge is aimed at the selection of issues to present on

appeal." *Makiel v. Butler*, 782 F.3d 882, 897 (7th Cir. 2015) (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)) (internal citation omitted). "Appellate counsel is not required to raise every non-frivolous issue and her 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.'" *Long v. Butler*, 809 F.3d 299, 312 (7th Cir. 2015) (quoting *Makiel*, 782 F.3d at 898). "Proving that an unraised claim is clearly stronger than a claim that was raised is generally difficult 'because the comparative strength of two claims is usually debatable.'" *Makiel*, 782 F.3d at 898 (quoting *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013)). And a defendant alleging ineffective assistance of appellate counsel cannot satisfy the prejudice requirement of *Strickland* unless he can show that the neglected claim was meritorious. *Ashburn v. Korte*, 761 F.3d 741, 751 (7th Cir. 2014).

Minnick's appellate counsel testified that he did not raise the claim because he did not believe that Minnick had a "fair and just" reason for withdrawing his plea because the plea agreement was clear that "the State had a free hand at sentencing" and the court had made it clear that it was not bound by any recommendation. (ECF No. 12-38 at 9-10.) He regarded Minnick's interest in withdrawing his plea as simply a desire to have a trial, which case law says is not a sufficient reason for withdrawing a plea. (ECF No. 12-38 at 10.)

The court of appeals accepted the factual findings of the circuit court and held "that postconviction counsel did not perform deficiently because the fair and just

motion claim was not clearly stronger than the manifest injustice claim rejected in *Minnick I*." *Minnick*, 2019 WI App 1, ¶ 13. Minnick argues that the "clearly stronger" standard is a standard distinct from *Strickland*'s reasonableness standard. (ECF No. 14 at 11.)

The Wisconsin Supreme Court's application of the "clearly stronger" standard, *see State v. Romero-Georgana*, 2014 WI 83, ¶46, 360 Wis. 2d 522, 545, 849 N.W.2d 668, 679; *State v. Starks*, 2013 WI 69, ¶6, 349 Wis. 2d 274, 282, 833 N.W.2d 146, 150, has been rightly criticized for seeming to add a third element to the *Strickland* analysis and suggesting that showing a claim was "clearly stronger" is the exclusive means of showing appellate counsel was ineffective. *Walker v. Pollard*, No. 18-C-0147, 2019 U.S. Dist. LEXIS 150379, at *50 (E.D. Wis. Sep. 4, 2019). But as developed by the Court of Appeals for the Seventh Circuit, *see, e.g.*, *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985), and adopted by the United States Supreme Court, *see Smith v. Robbins*, 528 U.S. 259, 288 (2000), the "clearly stronger" standard does not add a third element to the ineffective assistance analysis. Rather, it is merely one way a defendant may show that appellate counsel was unreasonable for not raising a claim on appeal. Appellate counsel also may be ineffective for failing to raise a claim that is equally as strong as (although not clearly stronger than) the claim raised. *See Walker*, 2019 U.S. Dist. LEXIS 150379, at *55. But the court of appeals misapplied federal law in Minnick's case only if the "clearly stronger" standard it applied was not the

appropriate way to assess the reasonableness of appellate counsel's actions.

Having said all of that, however, the court begins its analysis with the question of prejudice. *See Ashburn*, 761 F.3d at 751 (quoting *Morgan v. Hardy*, 662 F.3d 790, 802 (7th Cir. 2011) ("As the Court noted in *Strickland*, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' "). The court of appeals addressed the question of prejudice only in a footnote, stating, "Although we need not address prejudice, we note that Minnick could not establish prejudice because the sentencing court was charged with exercising its independent judgment, and the views of the presentence investigation report author and counsel were not controlling." *Minnick*, 2019 WI App 1 n.5 (internal citations omitted).

Only if Walker was actually ineffective was Minnick prejudiced by appellate counsel's failure to argue that Walker was ineffective. *See Ashburn*, 761 F.3d at 751. For Walker to have been ineffective it must have been unreasonable for her to have failed to advise Minnick of the possibility of withdrawing his plea if he could show a "fair and just reason" for doing so. Moreover, to establish prejudice Minnick must also show *both* that there was a "reasonable probability" that he would have moved to withdraw his plea had Walker informed him that it might be possible for him to do so, *see Hill*, 474 U.S. at 59, *and* that the circuit court would have allowed him to withdraw his plea.

Undoubtedly, Minnick was not the first defendant to encounter a recommendation in a PSI report that was substantially higher than his lawyer had estimated he would receive. Yet he has not offered any evidence that it is not only routine but expected that any reasonable attorney in that situation would advise her client of the possibility of withdrawing his plea. The extraordinary nature of Minnick's argument was emphasized by the prosecutor in his argument before the circuit court when he contended:

> If it is found ineffective that you do not go back to your client when you get the presentence recommendation and actively advise them or tell them, hey, you might want to withdraw your plea, it would change the way we litigate in this state. The expectation for every defense counsel is every time that presentence result came in there would have to be a brand new discussion and there would have to be fair and just withdrawals of pleas because the presentence was worse than you thought it was going to be all over the landscape of Wisconsin criminal courts.

(ECF No. 12-37 at 17-18.)

Far from being so routine as to be expected of any reasonable attorney, the extraordinary nature of Minnick's argument is underscored by the fact that he has not identified a single case where a defendant was allowed to withdraw his plea because of an unexpectedly high recommendation in a PSI report. In fact, Wisconsin courts have expressed skepticism at the idea that

a harsh sentencing recommendation in a PSI report would constitute a "fair and just reason" for withdrawing a plea. *See State v. Leitner*, 2001 WI App 172, ¶33, 247 Wis. 2d 195, 210, 633 N.W.2d 207, 214 (affirming denial of motion to withdraw plea and noting that it appeared that the defendant's true reason for moving to withdraw his plea was "fear of a harsh sentence due to the presentence report") (citing *State v. Booth*, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987) (affirming denial of motion to withdraw plea and noting that "[a] defendant may not delay his motion [to withdraw his plea] until he has the opportunity to test the weight of potential punishment" before seeking to withdraw his plea)); *see also State v. Lopez*, 2014 WI 11, ¶82, 353 Wis. 2d 1, 40, 843 N.W.2d 390, 410 (affirming denial of motion to withdraw plea and noting that there was reason to suspect that the defendant's true motivation for wanting to withdraw her plea was because the PSI recommended a harsh sentence and a co-defendant had just received a lengthy sentence).

Because Minnick has failed to show that any reasonable attorney in Walker's position would have advised Minnick of the possibility of withdrawing his plea following receipt of the PSI report, appellate counsel was not ineffective for having failed to raise the argument.

Additionally, or alternatively, Minnick has failed to show that there is a reasonable probability that he would have moved to withdraw his plea had Walker informed him of the possibility of doing so. As Minnick acknowledges, the PSI report did not cause Walker to

change her estimate regarding the length of the sentence. Specifically, Minnick asserts that he "confronted Walker about this discrepancy [between her estimate and the PSI recommendation], but she pooh-poohed it as meaningless, and doubled down on the advice that a sentence of ten years or less was 'likely.'" (ECF No. 14 at 19.[3])

Minnick has not shown that it was unreasonable for Walker to persist in her belief that a sentence of not more than ten years was likely. For example, he has not shown that PSI recommendations are a reliable predictor of ultimate sentences in similar cases or that any reasonable defense attorney would believe that a sentence below the PSI recommended range would be unlikely.

With Walker continuing to reasonably believe that a sentence of no more than ten years was likely, there is no evidence that Minnick would have decided to withdraw his plea had Walker advised him of the possibility of doing so. To the contrary, Minnick was clear that he relied on Walker's expertise and advice in deciding whether to go to trial. (ECF No. 12-34 at 69.) Given that Walker continued to persist in her reasonable belief as to Minnick's likely sentence, even had she advised Minnick of the possibility of withdrawing

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[3] Minnick supports this factual assertion only with a citation to his Wis. Stat. § 974.06 motion for post-conviction relief that he filed in the circuit court wherein he made an identical assertion but without any citation. (ECF No. 13-5.) Notwithstanding the absence of any affidavit or testimony supporting this assertion, the court accepts it for present purposes.

his plea, she would have continued to advise him to proceed to sentencing, and Minnick would have followed that advice.

Finally, to prove prejudice Minnick would have to show a reasonable probability that the circumstances established "fair and just" reasons to withdraw his plea—that is, that had he sought to withdraw his plea the court would have allowed him to. Because the court has found two independent reasons as to why Minnick has failed to show he was prejudiced by appellate counsel's allegedly deficient performance, it is unnecessary to consider this additional issue. Nonetheless, the court notes that Wisconsin courts have appeared skeptical of attempts to withdraw pleas under similar circumstances. *See Lopez*, 2014 WI 11, ¶82; *Leitner*, 2001 WI App 172, ¶33.

4. Conclusion

Walker's estimate that Minnick likely would be sentenced to no more than ten years of initial confinement was reasonable and remained reasonable following issuance of the presentence investigation report. Therefore, he was not denied the effective assistance of trial counsel. Nor has Minnick shown that a reasonable defense attorney in Walker's position would have advised him of the possibility of withdrawing his plea, or that, had Walker so advised him, there is a reasonable probability he would have moved to withdraw his plea. Therefore, he has failed to show he was prejudiced by appellate counsel's alleged unreasonable

conduct. Consequently, the court must deny Minnick's petition.

Finally, Rule 11 of the Rules Governing Section 2254 Cases requires the court to consider whether to grant Minnick a certificate of appealability. "The statute governing habeas relief requires a prisoner who seeks to appeal a district court's denial of his petition first to obtain a certificate of appealability by making 'a substantial showing of the denial of a constitutional right.'" *Peterson v. Douma*, 751 F.3d 524, 528 (7th Cir. 2014) (quoting 28 U.S.C. § 2253(c)(2)). "The prisoner need not show he is likely to prevail, but he must show 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.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Lying at the heart of this case is the reasonableness of Walker's sentencing estimate. The likelihood of the court imposing a particular sentence is a matter about which reasonable jurists may disagree, especially in a case such as this where the range was expansive. Therefore, the court finds that it is appropriate to issue a certificate of appealability as to both of Minnick's claims.

Specifically, the court issues a certificate of appealability as follows:

- Whether Minnick was denied the effective assistance of counsel when Walker stated it was

likely that the court would impose a cumulative term of initial confinement of no more than ten years.

- Whether Minnick was denied the effective assistance of appellate counsel when appellate counsel failed to argue that Minnick's trial counsel was ineffective for failing to advise him of the possibility of moving to withdraw his plea.

IT IS THEREFORE ORDERED that Minnick's petition for a writ of habeas corpus is denied. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that the court grants Minnick a certificate of appealability as set forth in this decision.

Dated at Milwaukee, Wisconsin this 20th day of October, 2020.

/s/ William E. Duffin
WILLIAM E. DUFFIN
U.S. Magistrate Judge

APPENDIX D

United States District Court

Eastern District of Wisconsin

JUDGMENT IN A CIVIL ACTION

DAVID MINNICK,

Petitioner,

v. Case No. 19-CV-033

DAN WINKLESKI,

Respondent.

☒ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED that petitioner David Minnick's petition for a writ of habeas corpus is **DENIED**.

IT IS FURTHER ORDERED petitioner's certificate of appealability is **GRANTED.**

IT IS FURTHER ORDERED this case is **DISMISSED**.

D:2

Date: October 21, 2020.

Gina M. Colletti, Clerk of Court
EASTERN DISTRICT OF WISCONSIN
(By) Deputy Clerk, s/Mary Murawski
Approved this 21st day of October, 2020.

/s/ William E. Duffin
WILLIAM E. DUFFIN
United States Magistrate Judge

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 26, 2021

Before

JOEL M. FLAUM, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-3253

DAVID MINNICK, *Petitioner-Appellant,* *v.* DAN WINKLESKI, Warden, *Respondent-Appellee.*	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 19-CV-33 William E. Duffin, *Magistrate Judge.*

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed on October 4, 2021, no judge in active service requested a vote on the petition for rehearing en banc,* and all judges on the original panel voted to deny rehearing.

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* Circuit Judge Candace Jackson-Akiwumi did not participate in the consideration of this matter.

It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

APPENDIX F

OFFICE OF THE CLERK

[SEAL]

Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215
P.O. Box 1688
MADISON, WI 53701-1688

TELEPHONE (608)266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

April 9, 2019

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Robert R. Henak
Henak Law Office, S.C.
316 N. Milwaukee St.,
Ste. 535
Milwaukee, WI 53202

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Gregory M. Weber
Assistant Attorney
General
P.O. Box 7857
Madison, WI 53707-7857

Michael D. Graveley
District Attorney
912 56th St.
Kenosha, WI 53140-3747

You are hereby notified that the Court has entered the following order:

No. 2017AP1308 State v. Minnick L.C.#2010CF1111

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, David M. Minnick, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

APPENDIX G

COURT OF APPEALS
DECISION
DATED AND FILED

November 28, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No.	**Cir. Ct. No.**
2017AP1308	**2010CF1111**
STATE OF WISCONSIN	**IN COURT OF APPEALS DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. MINNICK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority,

except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. David Minnick appeals from a circuit court order denying his WIS. STAT. § 974.06 (2015-16)[1] motion alleging ineffective assistance of postconviction counsel. We affirm the circuit court.

¶2 After he was convicted, Minnick moved to withdraw his no contest pleas on the grounds of manifest injustice because he relied upon his trial counsel's representations about the likelihood of sentencing outcomes. The circuit court rejected Minnick's ineffective assistance of counsel claim and denied the postconviction motion. In 2015, we affirmed Minnick's conviction and rejected his ineffective assistance of counsel claim. ***State v. Minnick***, No. 2014AP 1504-CR, unpublished slip op. (WI App June 10, 2015) (***Minnick I***).

¶3 In 2017, Minnick filed a WIS. STAT. § 974.06 motion alleging that his postconviction counsel was ineffective because counsel did not make an additional argument in the original postconviction motion: trial counsel was ineffective for not advising Minnick of the possibility of a pre-sentencing plea withdrawal motion which would have been subject to the fair and just reason standard (hereafter "a fair and just motion"). Minnick reasoned that once his trial counsel learned that the presentence investigation report's sentencing recommendation exceeded the sentencing range counsel had discussed with Minnick, counsel should have

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

informed Minnick that he could file a fair and just motion. *See* ***State v. Jenkins***, 2007 WI 96, ¶34, 303 Wis. 2d 157, 736 N.W.2d 24. Minnick alleged that he would have exercised the fair and just motion option had counsel so informed him.

¶4 After hearing testimony from postconviction counsel, the circuit court found that postconviction counsel did not consider the fair and just motion ineffective assistance claim to be clearly stronger than the claim he raised relating to post-sentencing plea withdrawal (the manifest injustice motion).[2] The court reiterated that trial counsel was not ineffective in her approach to sentencing and therefore postconviction counsel was not ineffective for failing to pursue an additional postconviction issue based on trial counsel's representation in relation to sentencing. The court denied Minnick's WIS. STAT. § 974.06 motion. Minnick appeals.

¶5 We review the circuit court's discretionary decision to deny Minnick's WIS. STAT. § 974.06 ineffective assistance of counsel motion under the erroneous exercise of discretion standard. *See* ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334.

¶6 Unless a defendant shows a sufficient reason for not raising an issue in a prior direct appeal, the issue may be barred in a subsequent WIS. STAT. § 974.06 proceeding. ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. Ineffective assistance

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[2] The clearly stronger standard was first set out in ***State v. Starks***, 2013 WI 69, ¶¶6, 59, 349 Wis. 2d 274, 833 N.W.2d 146.

of postconviction counsel may be a sufficient reason for failing to raise a claim in the prior direct appeal. ***State v. Romero-Georgana***, 2014 WI 83, ¶36, 360 Wis. 2d 522, 849 N.W.2d 668.[3] We address the merits of the § 974.06 motion.

¶7 In his WIS. STAT. § 974.06 motion, Minnick argued that his postconviction counsel was ineffective. Because Minnick alleges an ineffective assistance of trial counsel claim not previously litigated by postconviction counsel, Minnick had to show that his new ineffective assistance of trial counsel claim was clearly stronger than the ineffective assistance of trial counsel claim he previously pursued on appeal. ***Romero-Georgana***, 360 Wis. 2d 522, ¶4.

¶8 The clearly stronger analysis requires consideration of the claim made in ***Minnick I***. In ***Minnick I***, Minnick argued that his trial counsel guaranteed him a certain sentence, and he pled no contest in reliance upon counsel's guaranty, which did not come to pass. Citing the manifest injustice standard for plea withdrawal, Minnick sought to withdraw his no contest pleas due to ineffective assistance of trial counsel. ***Minnick***, No. 2014AP1504-CR, ¶1. Postconviction, the circuit court found trial counsel credible and Minnick

---

[3] For this reason we do not agree with the State that ***State v. Witkowski***, 163 Wis. 2d 985, 473 N.W.2d 512 (Ct. App. 1991), bars Minnick's WIS. STAT. § 974.06 motion. A claim of ineffective assistance of postconviction counsel is distinct from a claim of ineffective assistance of trial counsel. ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996).

not credible on the question of what trial counsel told Minnick about possible sentences. ***Id.***, ¶9. We held that the circuit court's findings about the information Minnick had before him when he decided to plead no contest were not clearly erroneous, ***id.***, ¶12, and the findings did not support Minnick's claim that he pled in reliance on trial counsel's statements. Those findings included:

> Minnick had weeks to consider the plea offer, knew that the attempted first-degree intentional homicide charge—with the weapons enhancer, a sixty-five-year felony—would be read in for sentencing and that the presentence investigation report recommended all consecutive sentences totaling twenty-six and one-half years, and understood from the plea colloquy that the court could impose the maximum sentence on each count and that all sentences could be imposed consecutively.

Id. We concluded that "Minnick has shown no more than that counsel predicted an outcome that did not come to pass." ***Id.***, ¶14. Misjudging a likely sentence was not a basis for an ineffective assistance of counsel claim. ***Id.***

¶9 Minnick's WIS. STAT. § 974.06 claim is premised on the same scenario we rejected in ***Minnick I***: that trial counsel's remarks about the sentence led Minnick to enter his no contest pleas. The twist Minnick applies in his § 974.06 motion is that trial counsel should have advised him about the option of filing a

fair and just motion and that postconviction counsel should have made this claim in Minnick's first appeal.

¶10 Postconviction counsel testified at the WIS. STAT. § 974.06 hearing that he did not believe a fair and just motion would have been well-founded given the record: during the plea hearing, Minnick was advised that the State had a free hand at sentencing and that the court was not bound by any agreement or recommendation regarding a sentence. Before sentencing, Minnick was aware that the presentence investigation report recommended a lengthier sentence. Postconviction counsel was aware of the different standards applicable to pre- and post-sentencing plea withdrawal motions,[4] but he determined that the record contained more factors favoring a post-sentencing manifest injustice motion.

¶11 The circuit court found that postconviction counsel understood the two plea withdrawal standards, but given the record, the post-sentencing manifest injustice claim was stronger because the court's sentence was known. The court concluded that postconviction counsel did not perform deficiently.

¶12 Postconviction counsel's assistance is assessed for deficient performance and prejudice. ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶38-39. Deficient

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[4] Pre-sentencing plea withdrawal motions are governed by the fair and just reason standard. ***State v. Jenkins***, 2007 WI 96, ¶34, 303 Wis. 2d 157, 736 N.W.2d 24. Post-sentencing plea withdrawal motions are governed by the manifest injustice standard. ***State v. Negrete***, 2012 WI 92, ¶16, 343 Wis. 2d 1, 819 N.W.2d 749.

performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.*** However, we review de novo whether counsel's performance was deficient or prejudicial. ***Id.***

¶13 The circuit court's findings of fact about postconviction counsel's conduct are not clearly erroneous. Combined with the determination in ***Minnick I*** that trial counsel's interactions with Minnick about sentencing did not constitute ineffective assistance, the additional postconviction findings support a determination that postconviction counsel did not perform deficiently because the fair and just motion claim was not clearly stronger than the manifest injustice claim rejected in ***Minnick I***.[5] Therefore, the circuit court properly exercised its discretion when it denied Minnick's WIS. STAT. § 974.06 motion.

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[5] Although we need not address prejudice, ***State v. Chu***, 2002 WI App 98, ¶47, 253 Wis. 2d 666, 643 N.W.2d 878, we note that Minnick could not establish prejudice because the sentencing court was charged with exercising its independent judgment, and the views of the presentence investigation report author and counsel were not controlling. ***State v. Smith***, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997) (the sentencing court "has an independent duty to look beyond the recommendations and to consider all relevant sentencing factors").

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX H

STATE OF WISCONSIN : CIRCUIT COURT : KENOSHA COUNTY BRANCH

STATE OF WISCONSIN, **MOTION HEARING**

Plaintiff,

–vs–

Case No.: 10-CF-1111

DAVID M. MINNICK,

Defendant.

HONORABLE ANTHONY MILISAUSKAS
Judge Presiding

APPEARANCES:

MR. MICHAEL GRAVELEY, District Attorney for Kenosha County, appeared on behalf of the plaintiff.

MS. ELLEN HENAK, Attorney at Law, appeared on behalf of the defendant.

Date of Proceedings: April 12, 2017

CYNTHIA M. FOWLER
Court Reporter

* * *

[23] don't—I don't read Lopez as changing that. I think that it is stretching it.

Now, as to the cases that say – There is no case that says it's not a fair and just reason when there has been some question as to recommendation to look at the PSI. I think what you are seeing in both Lopez and

Jenkins is in part an appraisal of what the motivation of the defendant was or would have been.

To that extent, I think you can bring in the PSI. However, here it mitigates in favor of saying, look, there was a mistake made and I think that that's the difference.

THE COURT: All right. Again, it's a motion for ineffective assistance of appellate counsel. We had the testimony of Michael Zell under oath. He was the appellate attorney for Mr. Minnick. The Court has to look at the deficient performance, if there is any, of appellate counsel, and then if I find that there was deficient performance, I have to find that that deficient performance was prejudicial. And the way the Court looks at that requirement, that is prejudicial to the defendant.

I will note that the Court has to look at whether this issue of not raising this claim that's being made by the defendant here today, the defendant has to show that this particular non-frivolous issue is clearly stronger than the issues raised in the original appeal. That's the first prong [24] I have to deal with.

And what do we have under oath? One witness today, appellate counsel, Mr. Zell. He indicated that he did file an 809.30 motion, ineffective assistance of trial counsel. We had numerous witnesses testify at that ineffective assistance motion. The Court ruled, found that there was no ineffective assistance of trial counsel.

Now the defendant has raised the issue of ineffective assistance of appellate counsel. Mr. Zell told me under oath he has been doing appellate work for at least a decade. I take that to be ten years. He talked about the plea withdrawal issue. He talked about the different standards. So he understands the different standards prior to sentencing, after sentencing. He understands the two different standards, fair and just reason being the standard prior to the sentencing.

He indicated to me that he didn't consider this issue but under oath he told me that it was not a strong issue. And why did he tell me that? He said because of how the plea came in. He indicated that Mr. Minnick did plead to the charges on May 18, 2012. And I'm looking at the CCAP records and this is part of the record from the original motion of ineffective assistance of trial counsel. Both parties had a free hand. Both parties could argue whatever they wanted. And I did already make rulings as to Mr. Minnick [25] signing a plea form, understanding the plea, understanding the penalties, understanding the Court didn't have to follow anybody's recommendation; that is, the State's or his attorney's and that would encompass the PSI. Judges are free to sentence as they please based upon each case and the requirements that I have to look at as to what I consider at a sentence.

So the defendant signs the plea form, enters his plea freely and voluntarily, understands that each side has a free hand, that the judge doesn't have to follow anybody's recommendation, and now we get the PSI – and the PSI obviously had a different recommendation

than what his lawyer was saying – but again Mr. Zell says, hey, that's not a strong issue. The stronger issue was after the sentencing 'cause now we know what happened. And he did file that motion. He did attack the trial counsel that it was misrepresented, it was misleading, that the attorney failed in her duties. So that was the stronger issue. That was the issue he filed under.

So I don't think the defendant has met the first prong. I don't think this issue is stronger. It was considered by the attorney based on what was said into the record. He's experienced. He indicates it's not a strong issue, the issue he filed was stronger. So the deficient performance by appellate counsel is denied and I'll ask for a [26] short order to that effect.

MS. HENAK: Your Honor, I prepared orders actually either direction. That's my practice.

THE COURT: You want to show it to Mr. Graveley while we're here?

MS. HENAK: Yes. That way I know when it gets entered.

THE COURT: Do you have any problems with that order? Tell me now or I'll sign it.

MR. GRAVELEY: Its fine.

THE COURT: All right. You want to present it to the clerk?

MS. HENAK: I just find that way it gets cleaner in terms of days.

THE COURT: I've been presented an order for the record. It says for the reasons stated on the record, on March 8, 2017 and April 12, 2017 the motion for post-conviction relief under 974.06 is denied. I'm signing the order for the record April 12, 2017 and we will file it and give everybody their copies. Thank you.

MS. HENAK: Thank you, your Honor.

(Whereupon, these proceedings were concluded)

APPENDIX I

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 25, 2016

Mr. Robert R. Henak
Henak Law Office, S.C.
316 N. Milwaukee Street
Suite 535
Milwaukee, WI 53202

Re: David M. Minnick
v. Wisconsin
No. 15-737

Dear Mr. Henak:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

APPENDIX J

COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No.	**Cir. Ct. No.**
2014AP1504-CR	**2010CF1111**
STATE OF WISCONSIN	**IN COURT OF APPEALS DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. MINNICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: ANTHONY G. MILISAUSKAS, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. David M. Minnick received a sentence quadruple that which he claims defense counsel guaranteed he would get. He seeks to withdraw his no contest pleas because he contends they were induced by counsel's ineffective assistance in making the

alleged promises. He also asserts that the trial court's credibility findings were clearly erroneous and that it erred by refusing to admit documentary evidence relevant to making accurate findings. We reject his contentions and affirm.

¶2 Upset that his wife planned to leave him, an intoxicated Minnick struck her on the head with a rifle butt and attempted to shoot her. She fled to her parents' house down the street. Minnick followed, firing shots in the neighborhood. He then tried to break down the door of his in-laws' house, broke windows, and shot inside their house, grazing his father-in-law.

¶3 Minnick was charged with aggravated battery, attempted first-degree intentional homicide, four counts of first-degree reckless endangerment, and attempted burglary, all by use of a dangerous weapon, and with endangering safety by reckless use of a firearm. The defense investigated a possible NGI plea due to Minnick's diagnosed post-traumatic stress disorder. Ultimately he withdrew the NGI plea in favor of no contest pleas to all but the attempted first-degree intentional homicide charge. That count was dismissed and read in.

¶4 Even with the dismissal of the attempted homicide charge, consecutive sentences could have imprisoned Minnick for over a century. The court imposed a forty-one-year sentence: twenty-seven years' initial confinement and fourteen years' extended supervision.

¶5 Postconviction, Minnick sought plea withdrawal or resentencing. He asserted that his no contest

pleas were not knowing, intelligent, and voluntary because they were entered in reliance on defense counsel's assurances that he would get concurrent sentences totaling no more than ten years. The court denied Minnick's motion. This appeal followed.

¶6 A defendant's post-sentencing effort to withdraw a guilty or no contest plea must prove a "manifest injustice" by clear and convincing evidence. ***State v. Negrete***, 2012 WI 92, ¶16, 343 Wis. 2d 1, 819 N.W.2d 749. "The manifest-injustice test is satisfied if the defendant's plea was the result of constitutionally ineffective assistance of counsel." ***State v. Hudson***, 2013 WI App 120, ¶11, 351 Wis. 2d 73, 839 N.W.2d 147, *review denied*, 2014 WI 14, ___ Wis. 2d ___, 843 N.W.2d 707. To establish constitutional ineffectiveness, a defendant must show both deficient representation and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We uphold a trial court's factual findings unless clearly erroneous, but decide de novo the legal question of whether counsel was constitutionally ineffective. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). A finding of fact is clearly erroneous when "it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted).

¶7 Minnick and defense counsel Laura Walker testified at the postconviction hearing. Minnick testified that Walker assured him that if he pled no contest, he "would get five to seven years, absolutely no more than ten," and that the sentencing judge "never, never

issued a consecutive sentence." He acknowledged, however, that Walker "would say, of course . . . I can't say exactly" what the sentence would be and that he understood the sentence ultimately was up to the court.

¶8 Walker conceded that she told Minnick she believed he would be "looking [at] anywhere between six to ten years," and "probably would get a concurrent sentence," but denied telling him that the judge never ordered consecutive sentences. She also testified that she told Minnick "repeatedly" that the disposition she believed likely was her opinion and that it "always had the caveat on the end that it's ultimately up to the judge what's going to happen."

¶9 The trial court found Minnick's testimony not credible and Walker's credible. Deciding which witnesses are to be believed "is the exact function of the trier of fact." ***State v. Christopher***, 44 Wis. 2d 120, 127, 170 N.W.2d 803 (1969). Minnick contends that finding is clearly erroneous, however, because the court based it on a misinterpretation of his testimony and failed to consider the corroborating testimony of his friend, brother, and daughter, who all had spoken to Walker while Minnick was pondering whether to enter no contest pleas.

¶10 The allegedly misconstrued testimony was elicited when postconviction counsel was questioning Minnick about the events leading to the charges against him. Minnick confirmed that he did not

dispute that "something very serious" had occurred that night. This exchange followed:

> Q. You're not asserting that you weren't there or that you didn't pull the trigger or that –
>
> A. No.
>
> Q. – you weren't drinking or any of that, correct?
>
> A. No.

¶11 Minnick contends that, as at other points in his testimony, in his nervousness he interrupted counsel's single question with his "No" answer. The court found, however, that Minnick "lied under oath," having told the arresting officers that he had drunk about eight twelve-ounce beers, and the fact that "the defendant under oath tells me he wasn't drinking . . . goes to his credibility."

¶12 Assuming without deciding that the court's finding about Minnick's testimony was clearly erroneous, the error was harmless. The court made numerous other findings in regard to Minnick's claim that he pled in reliance on Walker's alleged promises. It found that Minnick had weeks to consider the plea offer, knew that the attempted first-degree intentional homicide charge – with the weapons enhancer, a sixty-five-year felony – would be read in for sentencing and that the presentence investigation report recommended all consecutive sentences totaling twenty-six and one-half years, and understood from the plea colloquy that the

court could impose the maximum sentence on each count and that all sentences could be imposed consecutively. The record confirms these findings.

¶13 Minnick also contends the court failed to consider his supporters' corroborating testimony. His friend testified that Walker "was very certain" that Minnick "would do five to seven with an absolute possibility of maybe ten" years and that there was "no way" consecutive sentences would be ordered, but he acknowledged he understood Walker was conveying her professional opinion. The brother testified that Walker told him Minnick's sentence would be "something in the area of less than ten years but right around six and a half," that she was "really careful in her wording not to make an all[-]out guarantee," and, while "it was pretty clear that that's what she was hinting at," it was "somewhat an interpretation." The daughter testified that Walker said she "was strongly believing" "the judge wouldn't give [Minnick] any more than six years," but that she also "told me it was her opinion." The testimony of Minnick and his supporters does not establish that Walker gave unequivocal guarantees.

¶14 Minnick has shown no more than that counsel predicted an outcome that did not come to pass. Her misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim, *see* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272, and Minnick's "disappointment in the eventual punishment imposed is no ground for

withdrawal of a guilty plea," *see* ***State v. Booth***, 142 Wis. 2d 232, 237, 418 N.W.2d 20 (Ct. App. 1987).

¶15 In a related argument, Minnick contends that the trial court erred by refusing to admit at the postconviction hearing documentary evidence relevant and necessary to a proper assessment of Walker's credibility. The documents were an Office of Lawyer Regulation public reprimand Walker received in regard to her handling of this and other of Minnick's cases and a criminal complaint alleging felony charges against her before she obtained her law license. He claims they would have shown Walker's motivation to protect herself and her "willingness to act extremely when in conflict."

¶16 The admission of evidence is left to the discretion of the trial court. ***State v. Jackson***, 216 Wis. 2d 646, 655, 575 N.W.2d 475 (1998). We will not find an erroneous exercise of discretion where the trial court applied the facts of record to accepted legal standards. ***Id***.

¶17 Walker served as power of attorney over Minnick's finances while she represented him and was responsible for paying herself from his accounts. Minnick's complaint to OLR arose from a fee dispute – Minnick claimed he owed Walker $13,000 in fees; she claimed it was $30,000 – and the state of his accounts at the end of her representation. Walker was reprimanded for violating supreme court rules relating to fee agreements, her management and maintenance of the trust account and its records, notice and manner of

withdrawals, and the failure to provide a full written accounting of the funds held in trust when her representation ended. Minnick argues that the OLR matter should have been admitted as it gave Walker a motive to protect herself through her postconviction testimony.

¶18 We disagree. Consistent with Walker's claim, OLR noted that her original flat rate increased to $30,000 when the scope of her representation expanded beyond the criminal matter. Walker acknowledged failing to amend the fee agreement or draft a new one and violating other ethical rules and consented to the reprimand. And while OLR stated that *Minnick* claimed about $19,000 was unaccounted for at the end, *OLR* did not make a finding that such was the case. As the State notes, evidence that OLR apparently believed Walker's position is not relevant, as it would not have a tendency to make her credibility less probable, and thus not admissible. *See* WIS. STAT. §§ 904.01, 904.02 (2013-14).[1]

¶19 Further, the statement about the allegedly misappropriated, or at least unaccounted-for, sums is double hearsay. To be admissible, each prong of hearsay within hearsay must conform with an exception to the hearsay rule. *See* WIS. STAT. § 908.05; ***State v. Kreuser***, 91 Wis.2d 242, 249, 280 N.W.2d 270 (1979). Neither does.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶20 The OLR decision also was not admissible as other-acts evidence of Walker's motive to testify falsely. Assessing the admissibility of such evidence requires the trial court to determine whether the evidence is offered for an acceptable purpose, is relevant, and its probative value is substantially outweighed by the danger of unfair prejudice, confusion, or delay. ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶21 While evidence of other bad acts is admissible to prove motive, WIS. STAT. § 904.04(2), the OLR decision is not relevant to prove that Walker misappropriated Minnick's money. It simply did not make that finding.

¶22 Minnick also wanted admitted a copy of a five-count criminal complaint against Walker. She allegedly broke into the home of a love triangle competitor and choked and threatened to kill the person. Walker was convicted of one count of misdemeanor battery; the other counts were dismissed. The incident occurred before Walker was licensed to practice law. The complaint, Minnick contends, would have shown Walker's "willingness to act extremely when in conflict," even to the point of fabricating testimony.

¶23 The complaint was properly excluded. First, a complaint is not evidence and raises no inference of guilt. ***State v. Oppermann***, 156 Wis. 2d 241, 246 n.2, 456 N.W.2d 625 (Ct. App. 1990); WIS JI – CRIMINAL 145. Beyond that, the five-year-old battery conviction would have been used to show that Walker was capable of

perjury now because she acted badly in the past. That is classic, unduly prejudicial, "other-acts" propensity evidence that is irrelevant to a determination of credibility. *See* WIS. STAT. § 904.04(2)(a); *see also* ***State v. Clark***, 179 Wis. 2d 484, 491, 507 N.W.2d 172 (Ct. App. 1993).

¶24 The record supports the trial court's credibility findings and evidentiary rulings. We will not disturb them.

By the Court. – Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX K

STATE OF WISCONSIN	:	CIRCUIT COURT BRANCH 4	:	KENOSHA COUNTY

STATE OF WISCONSIN,
Plaintiff;

-vs-

DAVID M. MINNICK,
Defendant.

JUDGE'S RULING

CASE NO.: 10-CF-1111

HONORABLE ANTHONY MILISAUSKAS
Judge Presiding

APPEARANCES:

MR. MICHAEL GRAVELEY, Deputy District Attorney for Kenosha County, appeared on behalf of the plaintiff.

MR. MICHAEL ZELL, Attorney at Law, appeared on behalf of the defendant.

Date of Proceedings: June 2, 2014

CYNTHIA M. CHIKE
Court Reporter

[2] THE COURT: David M. Minnick, 10-CF-1111. Appearances, please.

MR. GRAVELEY: Your Honor, State appears by Mike Graveley of the district attorney's office.

MR. ZELL: David Minnick appears in person with Attorney Michael Zell.

THE COURT: All right. We have victim notification?

MR. GRAVELEY: We do, your Honor, and the victims are present.

THE COURT: Thank you. All right. We had a motion filed by the defense to withdraw their plea, ineffective assistance of counsel. The issues that were presented by the defense back on May 22, 2014 were, one, that the plea should be withdrawn because there's ineffective assistance of counsel, it was an involuntary plea, that Ms. Walker had specifically promised a –

(Discussion off the record between the Court and clerk)

THE COURT: – that Ms. Walker had given the defendant a specific promise for a sentence. There's also an ineffective assistance claim as to inaccurate information that was not provided to the Court at sentencing and there's a request for a resentence based on that inaccurate information.

I will note that this plea withdrawal is being made [3] after the sentence. I think that's an important factor for the Court. If it had been paid [sic] prior to sentence, obviously the Court would have to freely allow a defendant to withdraw his plea prior to sentence for any fair and just reason unless the prosecution would be substantially prejudiced. And I'm quoting from

State vs. Cain, 342 Wis. 2d 1, a Supreme Court case that was decided June 28, 2012.

Because it's a withdrawal after the sentence, Cain, the Supreme Court goes on to say that the defendant carries the heavy burden of establishing by clear and convincing evidence that the trial should permit the defendant to withdraw his plea to correct a manifest injustice.

And what does the Supreme Court say about the reasons for a manifest injustice? It has six – six factors listed in the case; that is, *State vs. Cain*. Number one, ineffective assistance of counsel; number two, the defendant did not personally enter or ratify the plea; number three, the plea was involuntary; number four, the prosecutor failed to fulfill the plea agreement; number five, the defendant did not receive the concessions tentatively or fully concurred in by the Court and the defendant did not reaffirm the plea after being told that the Court no longer concurred in the agreement; and number six, the Court had agreed that the defendant could withdraw the plea if the Court deviated from the plea agreement.

[4] Well, as to number two, the defendant did personally enter and ratify the plea. We look at the record, he filled out a plea form with the elements of the charges and we had a plea colloquy and there was no dispute as to what was being pled to and the defendant acknowledged exactly what he understood the plea to be and we went over the charges, the elements, the

agreement, all the necessary factors in the plea colloquy and that's in the record.

Number four, the prosecutor failed to fulfill the plea agreement. Well, the prosecutor had a free hand so there's no breach from the prosecutor's perspective. He didn't have to recommend anything. The State had a free hand.

And number six would be the Court had agreed that the defendant could withdraw the plea if the Court deviated from the plea agreement. There was no deviation. Again, the prosecutor had a free hand and the defendant was aware of that. Whether the defendant received the concessions tentatively or fully concurred by the Court, again, there was a plea agreement, it was in writing, there was a serious charge of attempted homicide that was dismissed, the defendant did plead to all the other charges and the State had a free hand. And we went over in the plea colloquy the defendant could receive consecutive sentences. That's in the record.

And what else is important, the defendant took the stand himself and testified. And what did the defendant say? [5] Under oath he says on page 54 of the transcript that was prepared of the March 31, 2014 hearing, question by defense counsel: "You're not asserting that you weren't there or that you didn't pull the trigger or that?" "No." Next question: "You weren't drinking or anything or any of that, correct?" "No."

So the defendant under oath tells me he wasn't drinking. That goes to his credibility because what does he say in his statement that he talked to the police when they arrested him? We had a motion hearing to suppress the statement. What does the statement say by Mr. Minnick that was given on November 15, 2010, which is the date of the incident? What does he say? I went to work on November 15, 2010 at 6 a.m. and I returned home at 3:30 p.m. When I arrived home, I went downstairs in my office and I started reading my textbook for school and I also started drinking beer. I drank probably about eight 12-ounce Natural Ice beers, eight 12 ounces. Natural Ice, the beer has a 5.9 percent of alcohol. That's pretty high for beer. I'm not an expert in beer but that's pretty high for beer. So he lied under oath.

MR. ZELL: I don't want to interrupt, but I don't – that's not the way I recall the testimony.

THE COURT: I just read what the transcript says.

[6] MR. ZELL: I understand.

THE COURT: And I gave you a chance to argue.

MR. ZELL: And I don't mean to interrupt.

THE COURT: I mean, you want to reargue something? That's what the transcript says. Under oath he says I was not drinking and it's a question you asked the defendant. And what does he say in his presentence, which is rather extensive, 21 pages.

Offender's version: He cannot say what was going through his mind that night – this is his version to the presentence writer on page three – or how much he drank but he said it was a lot. Okay? So he admits to drinking in his statement to the police, he admits to drinking to the presentence writer but under oath I wasn't drinking at all.

So I don't believe his testimony at all. It's not credible. There's nothing he didn't understand about the plea agreement. It was set for trial numerous times. He was given an opportunity to think about the plea agreement for weeks. His attorney went to see him 70-some times. Even if they didn't talk about the case one or two times, that's a lot of times to see a defendant. 74 visits in the jail. I can't remember the last time a defense attorney saw somebody 74 times in the jail. So he understood the plea agreement.

The other thing that's interesting about this case, [7] he's like indicating to me that he's shocked about Mr. Graveley's recommendation of 35 years. Well, let's look at what the presentence says. This is the report he acknowledged reading and went through and there's no factual errors. What does the presentence recommend? Let's add up the time. This is prior to sentence. Page 21, prior to sentence, he's aware the Department of Corrections is recommending on count one one to two years in prison; count three, three to four years; count four, two to two and a half years; count five, one to two; count six, three to four; count seven, three to four years in prison; count eight, three

to four years in prison. All counts should be consecutive. So where's the shock? It's right here prior to sentence 26 and a half years. He's aware that's being recommended.

The defendant also understands he was charged with a serious crime and he got the benefit of a plea agreement. Attempted homicide charge was dismissed and read in. That's a Class B Felony. What's the initial confinement for attempted homicide by use of a dangerous weapon? It's a Class B Felony. 40 years initial confinement plus five years because of the weapon. That's 45 years that he got the benefit of.

There's an independent indication that the defendant says the attorney said the Court would give the defendant no more than ten years, it would all run concurrent, but there wasn't never a definite statement. It was an opinion. And [8] during the plea colloquy the defendant's aware the judge can sentence you to the maximum penalty and it can be consecutive. So to come in here and say I'm shocked at my sentence, he's aware of what the sentence can be and I gave him a concurrent sentence on counts three and four. So I didn't follow the presentence. I didn't give him all consecutive time. He got concurrent on two counts to each other.

Also as to the sentencing, Mr. Graveley in his argument indicated, and I agree with him, I've never had a sentence where two doctors came to testify. I was shocked. At a sentencing. And they testified. And Dr. Lipke's testimony at the post-conviction motion was

basically the same information that was presented at sentencing. And if you read the presentence report, again which is 21 pages, it talks about the defendant's PTSD issues, his terrible childhood, all the issues he went through that he claims nobody knew about, and this is the presentence that he said he read and everything was accurate.

He talks about his personal history. And it's not happy. There's no – It indicates to me he was 15; defendant left home after his father hit him in the head with a bat. He went into the navy. The Court was aware of his terrible childhood, his military history that was positive, his employment when he got out of the military, emotional and physical health issues. Page 12, 13, 14, 15, 16, 17 – five [9] pages about his PTSD issues plus the two doctors that testified.

So I find Ms. Walker's testimony credible as to what she indicated as to what she had told the defendant as to what the sentence should be. There's nothing wrong with the plea. The plea colloquy was correct. Defendant knew what he was pleading to, he knew the plea bargain, what could happen as to the sentence being consecutive. All the information was presented to the Court. The defendant might not be happy with his sentence but that's what happens sometimes when somebody gets more than what they thought they should get. But it's still up to the judge. I still have the ultimate decision no matter what the attorneys tell me.

And, again, I gave a concurrent sentence to two counts. The defendant did not receive the maximum penalties on all these charges. He's well aware of what was said.

Again, his testimony on the stand at his post-conviction hearing is not credible. All your motions are denied, Mr. Zell. And do you have an order that I can sign or do you need to prepare something?

MR. ZELL: I do not. I will prepare one and send it through the mail.

THE COURT: And I'll sign it. And do you want Mr. Graveley to look at the order?

MR. ZELL: I'll provide him a copy [10] contemporaneously.

THE COURT: Okay? Thank you.

MR. GRAVELEY: Thank you, your Honor.

(Whereupon, these proceedings were concluded)

STATE OF WISCONSIN)
)
COUNTY OF KENOSHA)

I, Cynthia M. Chike, Official Court Reporter, in and for the Circuit Court, Branch 4, Kenosha County, Wisconsin, do hereby certify that the foregoing pages of proceedings have been carefully compared by me with my original stenographic notes and that the same is a true and correct transcript of the proceedings held on June 2, 2014 before HONORABLE ANTHONY MILISAUSKAS, judge presiding.

Dated this 26th day of June, 2014.

/s/ Cynthia M. Chike
Cynthia M. Chike
Official Court Reporter, Br. 4

APPENDIX L

[SEAL]

OFFICE OF THE CLERK

Supreme Court of Wisconsin

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September 9, 2015

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You are hereby notified that the Court has entered the following order:

No. 2014AP1504-CR *State v. Minnick*
L.C.#2010CF1111

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, David M. Minnick, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Diane M. Fremgen
Clerk of Supreme Court