No. 15-_____

In The
Supreme Court of the United States

DAVID M. MINNICK,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the deficient performance/resulting prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), still control claims of ineffective assistance of counsel in the course of plea discussions, or are the Wisconsin Court of Appeals and several other courts correct that counsel's advice regarding the likely sentence following a guilty plea need not be assessed for reasonableness?

PARTIES IN COURT BELOW

Other than the present Petitioner and Respondent, there were no other parties in the Wisconsin Supreme Court and Wisconsin Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner David M. Minnick respectfully asks that the Court issue a writ of certiorari to review the judgment of the Wisconsin Court of Appeals which affirmed the judgment of conviction and final order denying his post-conviction motion on direct appeal.

OPINIONS BELOW

The unpublished decision of the Wisconsin Court of Appeals, *State v. David M. Minnick*, 364 Wis. 2d 527, 868 N.W.2d 198 (6/10/15) is in Appendix A (A:1-A:10).

The unpublished order of the Wisconsin Circuit Court denying Minnick's post-conviction motion (6/18/14) is in Appendix B (B:1-B:2).

The unpublished oral findings of the Wisconsin Circuit Court denying Minnick's post-conviction motion (6/2/14) is in Appendix C (C:1-C:10).

The unpublished order of the Wisconsin Supreme Court denying discretionary review, *State v. David M. Minnick*, Appeal No. 2014AP1504-CR (9/9/15), is in Appendix D (D:1-D:2).

JURISDICTION

The Wisconsin Court of Appeals entered judgment on June 10, 2015. The Wisconsin Supreme

Court denied Minnick's timely petition for review on September 9, 2015. This Court's jurisdiction is invoked under 28 U.S.C. §§1257(a) & 2101(d) and Supreme Court Rules 13.1 & 13.3. As he did below, Mr. Minnick asserts the deprivation of his right to due process secured by the United States Constitution

CONSTITUTIONAL PROVISIONS INVOLVED

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

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

U.S. Const. amend. VI.

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

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

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

David Minnick suffered, and suffers, from post-traumatic stress disorder ("PTSD") as a result of extensive childhood abuse and abandonment, leading to both a suicide attempt and his leaving home at age 15 after his father hit him in the head with a baseball bat and in the mouth. He also suffered from alcoholism. However, in 1986, when he was 18, Minnick joined the Navy and forged a successful career, ultimately retiring in 2008. Between his retirement and his arrest here, he was a consultant to the military.

On November 16, 2010, the State of Wisconsin filed a criminal complaint charging David Minnick with aggravated battery, attempted first-degree intentional homicide, attempted burglary, and four counts of first-degree reckless endangerment, all by use of a dangerous weapon, and with endangering safety by reckless use of a firearm.

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

Minnick's attorney, Laura Walker, entered a plea of not guilty by reason of mental disease or defect ("NGI") on his behalf.[1] Walker retained both a defense psychologist, Anthony Jurek, and an expert specifically on the issue of PTSD, Dr. Howard Lipke.

On April 13, 2012, both parties informed the court that they were ready to proceed to trial on April

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

The Wisconsin Supreme Court summarized Wisconsin's bifurcated trial procedure for NGI cases as follows:

> A bifurcated criminal trial consists of two phases: (1) the guilt phase; and (2) the responsibility phase. When a criminal defendant pleads not guilty and not guilty by reason of mental disease or defect, the jury hears evidence relating to the defendant's guilt in the first phase of the trial, and if the jury finds the defendant guilty, the trial proceeds to the second phase. Wis. Stat. § 971.165(1)(a). In the second phase, the jury considers whether the defendant had a mental disease or defect at the time of the crime and whether, "as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law." Wis. Stat. § 971.15(1).

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

23, 2012. However, other obligations forced the court to reschedule the trial.

On April 30, 2012, the defense informed the court that Minnick had rejected the state's plea offer, and the court held a colloquy with Minnick confirming that fact. However, on May 18, 2012, the parties informed the court that they had reached a plea agreement under which Minnick would plead guilty to all but the attempted homicide charge, with both sides free to argue the appropriate sentence. This was the same offer Minnick had rejected earlier. Minnick entered no-contest pleas consistent with that agreement.[2]

At sentencing on June 28, 2012, the state asked the Court to impose consecutive sentences totaling 45 years of initial confinement.[3] The defense requested four years initial confinement on each count concurrent to one another, for a total of four years. The

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[2] Under Wisconsin law, "[a] criminal defendant, by pleading no contest, declines to exercise his or her right to put the State to their burden of proving him guilty beyond a reasonable doubt, but does not admit unqualified guilt." *State v. Black*, 2001 WI 31, ¶15, 242 Wis. 2d 126, 624 N.W.2d 363. "Even so, a no contest plea is 'an implied confession of guilt for the purposes of the case to support a judgment of conviction and in that respect is equivalent to a plea of guilty.' " *Id.* (citation omitted).

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

presentence report recommended consecutive sentences totaling between 16 and 22½ years of initial confinement.

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

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

Minnick moved, *inter alia*, to withdraw his plea, primarily on the ground that his trial attorney misled him about the likely disposition if he pled guilty. At the hearings on that motion, various of Minnick's friends and family testified that Attorney Walker spoke with them about the plea offer because Minnick was being "stubborn" and that she believed, based on her experience, that the sentence on a plea would be between five and ten years of initial confinement.

Based on that advice, they encouraged Minnick to accept the plea offer.

Attorney Walker testified and characterized her statements to Minnick's friends and family members as advice only, not a guarantee. Walker admitted that she only had two years of experience as an attorney when she took the case, and she never handled an NGI or mental responsibility defense case prior to this one. Walker admitted to giving Minnick a prediction about the likely outcome:

> I gave him my opinion. Anyone that comes to you – If you've been doing this for any amount of time, a person will come to you and they will ask what do you see is going to happen in this case, what do you think is going to happen, and you draw on your experiences with similar cases. I had a similar case, same county, different courtroom, same district attorney, where someone was actually shot and severely injured, they had surgery, and that person we negotiated a deal; he got six years.

Walker agreed she had told Minnick he would get only six to ten years of confinement, but characterized it as only an opinion and that ultimately the sentence was up to the judge. She told Minnick that she had been before this judge many times and did not believe that he would get consecutive time.

When pressed on this issue, Walker admitted she truly believed the opinion she gave Minnick and his

friends and relatives about the likely outcome, and even told the DA that is what she believed:

> Q. (By Mr. Zell) Well, the witnesses did assert that you said something between six and ten years was the likely outcome. Does that sound right?
>
> A. I agreed and I've said all along, even told the D.A. during one of our meetings, that I thought that's where we would be.

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

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

In ruling on Minnick's motion, the circuit court mistakenly construed it as arguing only that Walker had "promised" Minnick a particular sentence (C:2).[4] In concluding that Minnick had failed to meet his burden of proof on that point, the court rejected Minnick's testimony and deemed Walker's "credible." (C:4-C:9).

The Court of Appeals affirmed (A:1-A:10). On the issue presented here, the court concluded that

> 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

[4] Post-conviction counsel had made clear throughout the post-conviction proceedings that his argument was *not* limited to a claim that Walker had "promised" or "guaranteed" a particular sentence. In his post-conviction motion, prior counsel argued that: "Walker was ineffective by giving Minnick advice which was inaccurate, unfounded, incomplete, and prejudicial in order to convince him to enter a plea when his true desire was to have a trial regarding his mental responsibility;" that "Minnick's trial attorney was deficient because she gave him inaccurate and misleading advice in order to encourage Minnick to enter a plea and waive his right to a trial;" and that "Minnick's plea was also involuntary and unintelligent, as he was given misleading and inaccurate information about the likely result of sentencing based on his attorney's asserted familiarity with the Court's practices." At the hearing on the motion, moreover, he argued both that Walker led Minnick and his relatives to believe her sentence opinion was "essentially a guarantee" and that she gave "poor advice about what is likely to occur in a case based on very limited experience," that being her "two years of experience and limited experience in a number of cases."

> 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).

(A:6-A:7).

The Wisconsin Supreme Court denied Minnick's petition for discretionary review on September 9, 2015 (D:1-D:2).

REASONS FOR ALLOWANCE OF THE WRIT

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

The Wisconsin Court of Appeals' decision that counsel's advice regarding the likely sentence upon a plea of guilty is categorically excluded from the reasonableness analysis for effective assistance mandated by *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), conflicts with the clear mandate of those decisions. However, it appears that a number of other courts

have demonstrated a similar hesitancy to apply this Court's deficient performance analysis, choosing instead to either categorically immunize advice regarding likely outcomes from analysis for reasonableness, as did the court below, or by substituting other, more stringent tests for deficiency.

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

A. The Decision Below Conflicts with the Decisions of This Court

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

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

57, 58-59 (1985). "Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given facts." *McMann v. Richardson*, 397 U.S. 759, 770 (1970). Accordingly, the reasonableness analysis turns, "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *Id*. at 770-71.

"[A]n accused is entitled to rely upon his counsel . . . to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948). "Where . . . a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (quoting *McMann*, 397 U.S. at 771); *see Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973). *See also Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) (unreasonable advice leading defendant to reject beneficial plea offer was ineffective assistance).

Moreover, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Court recognized that uncertainty regarding the likely consequences of a plea does not absolve counsel from providing reasonable and accurate information. There, the issue was whether counsel representing a non-citizen defendant was ineffective

for advising the client that a drug conviction would not result in deportation. The Court found deficient performance since the law on the point was clear and knowable. *Id.* at 368-69.

Still, the Court also noted counsel's obligations under circumstances in which the consequences of a plea are unclear or uncertain.

> The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369. Accordingly, when the likely consequences of a plea are unclear, it is the obligation of effective counsel to advise the client of that fact.

While holding that the same deficiency standard applies in the context of guilty pleas as at trial, the Court in *Hill* fine-tuned the prejudice prong to "focus[ ] on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill*, 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

The Wisconsin Court of Appeals' categorical or *per se* approach, holding that counsel's "misjudgment of the likely sentence is not a basis for an ineffective assistance of counsel claim" (A:6), conflicts with the case-by-case analysis of reasonableness required by this Court. As this Court made clear in *Strickland*, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." 466 U.S. at 688-89. Rather, courts must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.*, at 690. *See also Williams v. Taylor*, 529 U.S. 362, 391 (2000) (noting that "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence'" (citation omitted)); *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (rejecting as inconsistent with *Strickland* lower courts' *per se* rule that counsel's failure to file notice of appeal constitutes deficient performance).

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

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

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

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

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

just' reason to allow withdrawal of a plea agreement"); *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999) ("[A]n attorney's mere inaccurate prediction of sentence does not demonstrate the deficiency component of an ineffective assistance of counsel claim"); *United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1993) ("A miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel"). *See also State v. DiFrisco*, 137 N.J. 434, 457, 645 A.2d 734, 746 (1994) ("Erroneous sentencing predictions, however, do not amount to constitutionally-deficient performance"); *People v. Jones*, 144 Ill.2d 242, 162 Ill.Dec. 15, 25, 579 N.E.2d 829, 839 (1991) (holding that counsel's erroneous prediction that trial court would not enter death sentence did not amount to constitutionally-deficient performance).

While these decisions often speak in terms of an inaccurate assessment of the likely sentence "generally" being insufficient to constitute deficient performance, none identifies the missing ingredient in terms of the reasonableness analysis mandated by *Strickland* and *Hill*. Rather, in those few cases where they identify what more they believe is needed, some courts point to the extent to which counsel underestimated the likely sentence and require a "gross mischaracterization" of the likely outcome. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 868 (9th Cir. 2004) ("'Erroneous predictions regarding a sentence are deficient only if they constitute "gross mischaracterizations of

the likely outcome" of a plea bargain "combined with . . . erroneous advice on the probable effect of going to trial."'" (citations omitted)); *O'Tuel v. Osborne*, 706 F.2d 498 (4th Cir. 1983) (deficient performance where counsel "grossly misinformed" client regarding parole eligibility). *But see United States v. Barnes*, 83 F.3d 934, 940 (7th Cir. 1996) ("A gross mischaracterization of the sentencing consequences of a plea may provide a strong indication of deficient performance, but it is not proof of a deficiency" (citations omitted)).

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

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

> [a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty. "Although the attorney's analysis need not provide a precisely accurate prediction of the respective consequences of pleading guilty or going to trial, the scrutiny must be undertaken in good faith." When the attorney fails to do so and that failure is the decisive factor in the decision to plead guilty, the Sixth Amendment is violated and the defendant may withdraw his plea.

Moore v. Bryant, 348 F.3d 238, 241 (7th Cir. 2003), citing and quoting *United States v. Barnes*, 83 F.3d 934, 939-40 (7th Cir. 1996).

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

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

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

On others, the Seventh Circuit has deemed its "good faith" standard to be more restrictive than the objective reasonableness standard of *Strickland*. Thus, in *United States v. Cieslowski*, 410 F.3d 353 (7th Cir. 2005), defense counsel advised her client to stipulate to a sentence of 210 months after overlooking an amendment to the Sentencing Guidelines reducing the maximum Guidelines range for the defendant's conduct to 168 months. The Court of Appeals upheld the denial of Cieslowski's motion to withdraw his plea, concluding that, although counsel's "error shows negligence on her part, there is no evidence that her failure to spot Amendment 615 resulted from a lack of good-faith effort." *Id.* at 359. Because negligence is, by definition, the failure to do "what an objectively reasonable person would do in the circumstances," *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2404 (2011), the Seventh Circuit's application of its "good faith" standard in *Cieslowski*, directly conflicts with *Strickland* and *Hill*.

Finally, several courts have strictly applied the objective reasonableness standards consistently with *Strickland* and *Hill*. *See, e.g.*, *United States v. Booze*, 293 F.3d 516, 518 (D.C. Cir. 2002) ("This circuit has held that a lawyer who advises his client whether to

accept a plea offer falls below the threshold of reasonable performance if the lawyer makes a plainly incorrect estimate of the likely sentence due to ignorance of applicable law of which he should have been aware." (Internal quotation marks omitted)), citing *United States v. Gaviria*, 116 F.3d 1498, 1512 (D.C. Cir. 1997); *Cullen v. United States*, 194 F.3d 401, 404 (2d Cir. 1999) (deficient representation where counsel provided significantly inaccurate calculation of sentencing ranges upon plea and conviction after trial); *United States v. Grammas*, 376 F.3d 433, 437 (5th Cir. 2004) (counsel's performance "was deficient because, among other things, [he] was unfamiliar with the Sentencing Guidelines and substantially misstated [client's] exposure"); *Risher v. United States*, 992 F.2d 982, 983-84 (9th Cir. 1993) (failure to advise re potential application of career offender provisions of Sentencing Guidelines was deficient performance). *See also State v. Prindle*, 2013 MT 173, ¶29, 370 Mont. 478, 304 P.3d 712 ("An erroneous prediction by defense counsel can rise to the level of a misrepresentation" and thus deficient performance).

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

1. Counsel's Advice was Unreasonable and Thus Deficient

Minnick entered his plea based on the advice of counsel. Under these circumstances, "the voluntariness of the plea depends on whether counsel's advice

'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 U.S. at 56 (quoting *McMann*, 397 U.S. at 771).

At the time of Minnick's plea, Attorney Walker had been practicing law for little more than two years and had never previously handled an NGI case. She knew that Minnick faced a combined maximum sentence of 75 years initial confinement and 30½ years extended supervision with an attempted homicide count being read in, that the state would have a "free hand" regarding a sentence recommendation, and that the court was free to impose anything up to the maximum. As noted by the Court of Appeals, "[e]ven with the dismissal of the attempted homicide charge, consecutive sentences could have imprisoned Minnick for over a century." (A:2). She knew that three separate victims were involved and that, although Minnick insisted that he did not intend to kill anyone, the court was free to disregard that assertion. She also knew that, although evidence supported her claim that the offenses were attributable to Minnick's PTSD, other evidence disputed that.

Additionally, Walker knew that Minnick was 45 years old at the time and that therefore "the exposure here is more than a life sentence." She knew that the court had twice denied her requests to reduce bail from $500,000 to $99,000, each time relying upon the potential punishment and the extremely serious and violent nature of the offense, a view that was fully corroborated by the factual basis contained in the criminal complaint.

Given these circumstances, it may have been reasonable for Walker to advise Minnick that she would argue for a particular sentence. However, even if she did not use the terms "promise" or "guarantee," it is wholly unreasonable for her to have advised him, as she admits doing, that a sentence of no more than ten years initial confinement was "likely" under the plea agreement and that consecutive time was unlikely. Defendants do not generally serve less than ten years in prison or serve merely concurrent time after a shooting spree in which they separately shot at three different victims. Given the circumstances Walker knew at the time, such a sentence was at best a remote possibility, and misleading her client into believing otherwise was unreasonable.

Because Walker's own testimony, which the circuit court deemed credible, establishes deficient performance here, it is irrelevant that the circuit court viewed Minnick's testimony as incredible.

Walker's unreasonable advice concerned the likelihood the sentencing court would exercise its power in a particular way, not the scope of that court's power or the possible sentence. The maximum possible sentence and the likely sentence in a particular case are two different things, although reasonable advice regarding both is critically important to one contemplating a plea. *E.g.*, *Moore*, 348 F.3d at 241 ("A reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty."

(Citation omitted)); Wis. Stat. §971.08(1)(a) (court to advise pleading defendant, inter alia, of the potential penalties). It is therefore irrelevant that Walker's advice and the plea colloquy both indicated that the sentencing court was not bound by any promises or recommendations and could sentence Minnick up to the maximum.

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

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

In the proceedings below, the state has not seriously disputed resulting prejudice in this case, and with good reason. The record and the evidence at the post-conviction hearing establish that, but for Walker's unreasonable advice, Minnick would have continued to insist on a trial on his NGI defense, just as he had 18 days earlier when he rejected exactly the

same plea offer. *See Hill*, 474 U.S. at 59 ("[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.").

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

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

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

The difference between the sentence Walker advised Minnick of and the sentence imposed is substantial. To a 45-year-old man, a ten-year initial

confinement term leaves him with the possibility of a substantial period of freedom and the physical ability to make a living afterwards. A 27-year initial confinement term, while not necessarily the same as a life sentence, leaves him with much less.

The state thus reasonably has chosen not to challenge Minnick's showing of resulting prejudice.

* * *

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

CONCLUSION

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

Respectfully submitted,

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Dated at Milwaukee, Wisconsin, December 4, 2015.

APPENDIX A

COURT OF APPEALS DECISION DATED AND FILED

June 10, 2015

Appeal No. 2014AP1504-CR	**Cir. Ct. No. 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.

---

[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 B

STATE OF WISCONSIN	:	CIRCUIT COURT	:	KENOSHA COUNTY

STATE OF WISCONSIN,
PLAINTIFF;

v.

DAVID M. MINNICK,
DEFENDANT.

CASE NO.
2010CF001111

ORDER DENYING MOTION

BASED UPON THE FOREGOING PROCEEDINGS, including the postconviction motion filed by the defendant, and the hearings held regarding that motion, the postconviction motion filed by the defendant is hereby denied in its entirety for the reasons stated on the record by the Court on June 2, 2014.

Dated this 18 day of June, 2014.

BY: /s/ Anthony Milisauskas
Hon. Anthony Milisauskas

ANTHONY MILISAUSKAS
Circuit Judge Branch 4

Drafted by:

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APPENDIX C

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 D

OFFICE OF THE CLERK

[SEAL]

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