No. 14-3158

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CURTIS J. PIDGEON,

Petitioner-Appellee,

vs.

JUDY P. SMITH,

Respondent-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
THE HONORABLE BARBARA B. CRABB, PRESIDING

BRIEF OF PETITIONER-APPELLEE

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DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rule 26.1, Curtis Pidgeon's lawyer informs the Court that Federal Defender Services of Wisconsin, Inc., through Julie K. Linnen and Kelly A. Welsh, represented Petitioner-Appellee Curtis Pidgeon, who is a natural person, in the district court. On appeal, Federal Defender Services of Wisconsin, Inc., through Joseph A. Bugni, continues to represent Mr. Pidgeon in this Court.

Dated: January 8, 2015

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JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in the Respondent-Appellant's brief is complete and correct.

1.0 Statement of the Case

In the fall of 2007, Curtis Pidgeon was charged with several counts of sexual assault of a minor. R.18–4:3,13. The charges stemmed from a night of heavy drinking and drug use. *Id.* at 18–21. Earlier in the day, Pidgeon started drinking with his then-girlfriend and her two daughters. *Id.* at 16. When Pidgeon's girlfriend left for work, he allegedly had sexual contact with the daughters, who were then fifteen and sixteen years old. *Id.* at 16–17. Between the two girls, the state charged him with six counts. R.28:2.

Initially Pidgeon fought the case. He made a speedy trial demand and prepared for trial—all pro se. R.38:1. Along the way, the Court got involved and appointed an attorney for Pidgeon. *Id.* The attorney was Joseph Fischer, and it's his performance that lies at the heart of this appeal.

After taking the case, Fischer moved to adjourn the trial. *Id.* at 2. Pidgeon responded by sending a letter to the Court asking that Fischer recuse himself for, among other things, neglecting to keep contact with him. *Id.* Fischer never withdrew. Instead, he waived Pidgeon's speedy trial rights and adjourned the trial for several months. *Id.* In the meantime, DNA testing came back tying Pidgeon to having contact with the fifteen year old. *Id.* Those same results also tied him to a separate, older sexual-assault case in a different county, Columbia County. *Id.* The allegation in that case was that Pidgeon committed third-degree sexual assault of

an adult. That crime can be committed by ejaculating or urinating on a person without his or her consent, and it has a maximum sentence of ten years. R.46:3. Wis. Stat. §§ 940.225(3); 939.50(3)(g). The precise allegations of that offense, however, were never fleshed out in the record and the reference to a third-degree sexual assault charge comes from the district court's order. R.46:3.

After learning about the potential charges in Columbia County, Fischer consulted with the district attorney and made a critical error. R.18–2:2. He and the district attorney looked at Pidgeon's criminal history and concluded that if Pidgeon was convicted of both the sexual assault of the fifteen year old and the third-degree sexual assault of an adult in Columbia County, he would face mandatory life in prison. *Id.* For reasons unclear in the record, Fischer did not believe that Columbia County would pursue charges against Pidgeon. But with a mandatory life sentence hanging out there, he sought to broker a deal resolving both charges. *Id.* at 2–3.

For Pidgeon's part, after learning that mandatory life was a possibility, he was set on doing anything he could to avoid spending the rest of his life in prison. He broke down, wept, and told his lawyer to get whatever deal he could to save him from life imprisonment. R.40:35. At first, the district attorney offered Pidgeon a deal for the sexual assault of the fifteen year old, capping the State's recommendation at ten years, and he could argue for seven. R.18–3:3. But Columbia County wanted Pidgeon to serve ten years if it was going to forgo charging him. *Id.*

So Fischer agreed to ten years to avoid the possibility of mandatory life imprisonment. R.40:19–20.

At first glance, that's not a bad deal: avoiding a mandatory life sentence in return for a plea and ten years in prison. The problem was that Pidgeon never faced mandatory life imprisonment. Like many states, Wisconsin has a three-strikes provision for habitual criminals. Wis. Stat. § 939.62. Fischer believed that Pidgeon would have three strikes if convicted in Columbia County because of: (1) his 1991 conviction for battery; (2) the sexual assault of the fifteen year old; and then (3) the third-degree sexual assault of an adult in Columbia County. R.28:3. So if he pled or lost at trial in that last case he would get life.

Fischer was, however, wrong. The 1991 conviction did not count under the habitual-offender statute. *Id.* In addition, third-degree sexual assault of an adult is not an eligible offense. And for that matter, since the two predicate convictions have to pre-date the conduct at issue, a conviction for sexual assault of the fifteen year old would not have counted either. That is, the third-degree sexual assault of an adult predated the sexual assault of the fifteen year old, so Pidgeon would not have had any strikes against him under the habitual-offender statute. A simple review of the statute would have revealed this to Fischer—the predicate offenses are clearly laid out. *See* Wis. Stat. § 939.62(2m)(a)–(d). So is the fact that the

convictions must "preced[e] *the commission of the crime* for which the actor presently is being sentenced." Wis. Stat. § 939.62(2) (emphasis added).

But Fischer didn't do the minimal research necessary to find this out, so Pidgeon labored under the belief that he was facing mandatory life and reluctantly took a deal. Before the plea, Pidgeon signed a standard plea questionnaire. *Id.* And spaced between his signature, he wrote the letters "T" "D" and "C." R.18–5:2. Pidgeon later testified that he scribbled this as a sign that he was only taking the plea under threats, duress, and coercion. R.40:17. Pidgeon also left the same three letters on the stipulation concerning the agreed sentence filed with court. *Id.* at 18. Here is an enlarged copy of signature that appeared on the form.

R.18–5:5. The judge didn't notice these scribbled protests and accepted Pidgeon's no contest plea. R.18–4:16.

Since the parties jointly recommended a sentence of ten years, the judge did the plea and sentencing at the same time. When the judge asked if Pidgeon had anything to say, he spoke a little about the offense and said that "the whole

weekend was a weekend of drinking and drug use, but those aren't the things that I ever got a chance to address right now or *in a form of a trial because of the fact this happened over a series of days* [sic] *this case*." R.18–4:24 (emphasis added). He then recounted his alcoholism and drug use at the time and how he had no recollection of "everything that happened that night because of my alcohol use." *Id.* at 25. He then hemmed and hawed for a bit and told the judge "I don't, I don't disagree with—I can't fully say I, I am trying to say it never happened because obviously there's, there's evidence that it did happen. And as far as the—any type of force being used, I don't recall anything or I actually wasn't trying to force anybody to, to do anything. But, but my own actions, itself, I shouldn't have put myself in that situation to begin with in any way and that's why I am taking responsibility for that." *Id.* at 25. Despite the lack of contrition, the judge accepted the joint recommendation and sentenced Pidgeon to ten years initial incarceration followed by ten years of extended supervision. *Id.* at 27.

Soon after being sentenced and going to prison, Pidgeon learned that under Wisconsin's three-strike provision, he was not facing life imprisonment for the Columbia County case. R.40:19. He then sought post-conviction relief before the state courts but was denied a hearing; he appealed with the same result. R.28:4–5. Finally the district court saw the merit of his claim and ordered an evidentiary hearing. *Id.* at 18–20.

Before the evidentiary hearing, the parties submitted a stipulation of certain facts. R.38. Among them, the parties stipulated

- That Fischer believed that Pidgeon would be facing mandatory life, if convicted of both the Dodge County and Columbia County cases. *Id.* at 2.

- That before an April status conference, Fischer did not meet privately with Pidgeon to discuss the case, and represented to the Court that Pidgeon was facing potential life because the Dodge County and Columbia County cases could be second and third strikes. *Id.* at 2.

- That then on the day of the plea and sentencing, Fischer met with Pidgeon for thirty minutes. *Id.* at 3.

- That during the conversation, they signed the stipulation jointly recommending that the judge sentence him to ten years imprisonment, followed by ten years of extended supervision. *Id.* at 3.

Finally, the parties stipulated that before sentencing Fischer acknowledged that another "strike offense" could lead to life imprisonment without the possibility of parole. *Id.*

At the evidentiary hearing, Pidgeon supplemented the parties' stipulation and testified about his case and the fact that had he not been advised that he was facing mandatory life, he would not have pled guilty to sexual assault of the fifteen year old. R.40: 9–12. He described how the threat of mandatory life loomed over all of the proceedings, and if he did not take the deal right away, it was forever off the table. *Id*. at 12. He also explained what the "T" "D" and "C" scribbled by his signature meant. *Id.* at 17. He felt that he "signed [it] under threat, duress, and

coercion." The state cross-examined Pidgeon about whether he understood that if he prevailed that he could still be charged in both counties with the cases. *Id.* at 28.

As the State's brief notes, the judge was initially surprised that Pidgeon's attorneys did not call Fischer. R.40:36. She believed that she did not have enough information to decide whether he got a reasonable sentence. *Id.* at 37. She also questioned whether the 1991 battery case could possibly have counted as predicate offense. *Id.* at 38. His attorneys took the position that it's impossible to know whether the sentence was reasonable, and the issue is not the sentence, but whether Pidgeon would have exercised his right to trial had he not been given incorrect information. So really Fischer had nothing to add to the analysis. *Id.* at 38–39. The parties then agreed and the court accepted the fact that "no one is disputing that Mr. Fischer gave the advice that Mr. Pidgeon said he did." *Id.* at 41. And then the court distilled the issue down to its essence: it didn't matter if Pidgeon got a good deal or a bad deal; the issue was whether Fischer's advice affected his ability to pursue his trial rights. *Id.* at 43. The court outlined her reservations and concerns and then ordered the parties to brief the issue. *Id.* at 45. The State did not, however, call the prosecutor in Pidgeon's case, nor did it ask for a continuance so it could call Fischer.

After the parties submitted briefing, the district court found that Pidgeon's testimony was credible. R.46:8. It found that Fischer's advice fell below the minimal

standard for constitutional competency. *Id.* And it found that Fischer could not have reached the conclusion concerning mandatory life, "had he done the minimal research to determine that petitioner's Dane County conviction was not for a violent felony." *Id.* at 2–3. Looking at the facts that supported Pidgeon's intent on going to trial, including his credible testimony, his signing the form under protest, and his push toward trial before learning that mandatory life was the potential outcome, the district court found that if it weren't for Fischer's advice about facing a potential life sentence, Pidgeon would have gone to trial. *Id.* at 8–10. The Court then granted the writ.

2.0 Summary of the Argument

The State has several arguments for why the district court erred. First, it argues that since Fischer didn't testify, Pidgeon could not meet his burden. It bases its argument on the district court's order for an evidentiary hearing and Wisconsin's procedures in so-called *Machner* hearings, where defense attorneys are required to testify. *See State v. Machner*, 285 N.W.2d 905 (Wis. Ct. App. 1979). But neither Wisconsin's procedures for post-conviction hearings, nor the district court's order stand as constitutional pre-requisites for finding an attorney ineffective. Indeed, no federal court has ever held that a necessary condition for finding an attorney ineffective is that she must testify at the hearing.

What's more, the record fully supports granting Pidgeon relief. Fischer's advice wasn't a matter of strategy; he was just wrong—really wrong—on the penalties that Pidgeon faced. There is no refuting that Pidgeon didn't face mandatory life. Pidgeon was also deemed credible by the district judge who listened to his testimony and saw his demeanor, and much in the record supported his testimony that he would have gone to trial had he not been told that he was facing mandatory life. Thus, the lack of Fischer's testimony did not preclude the Court from finding Fishcer ineffective.

3.0 Argument

This Court reviews de novo the district court's ultimate legal decision that Pidgeon's custody violates the constitution. *See Quintana v. Chandler*, 723 F.3d 849, 853 (7th Cir. 2013). And when, as there was here, an evidentiary hearing, this Court evaluates the district court's fact-finding and credibility determinations for clear error. *Id.* The question of whether a defense attorney was ineffective turns on whether the lawyer was reasonably competent. In the context of a plea, a "reasonably competent lawyer will attempt to learn all of the relevant facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis to the client before allowing the client to plead guilty." *Bethel v. United States*, 458 F.3d 711, 717 (7th Cir. 2006). Finally, it's not enough that Fischer wasn't competent, Pidgeon must also establish prejudice. Meaning: but for the

incompetent advice, there was a substantial probability that he would have gone to trial. *Julian v. Bartley*, 495 F.3d 487, 498 (7th Cir. 2007).

3.1 Fischer's testimony was not a constitutional prerequisite for granting relief.

The State's argument for reversal conflates the constitutional standard for establishing ineffective assistance of counsel with the procedural mechanisms that Wisconsin has adopted for post-conviction proceedings and that the district court outlined in its order. Yet neither Wisconsin's procedures nor the district court's order are constitutional prerequisites for granting relief. The first four pages of the State's argument section seizes on the district court's order and Pidgeon did not fulfill every detail of that order. St. Br. at 13–17. But the court's order is not a constitutional requirement: it is simply an outline of the evidence the court wanted to hear. And the district court was satisfied with the stipulation and hearing only Pidgeon's testimony. So the State can't argue that by failing to abide by the district court's order, Pidgeon failed to establish that Fischer was ineffective. The two are distinct. Calling Fischer did not ensure relief, nor did failing to call him preclude relief.

What the district court had to do was look at the record and determine whether Pidgeon had met his burden. *See Socha v. Boughton*, 763 F.3d 674, 679 (7th Cir. 2014). This it did, and it was convinced that with a modicum of effort, Fischer would have found that Pidgeon was not facing a mandatory life sentence.

R.46:8–10. And Pidgeon's testimony that he would have gone to trial but for that advice was credible. *Id.* at 10. Neither the Supreme Court nor this Court have ever demanded anything more. So there's no basis to find error in the district court refusing to deny relief when the petitioner didn't follow the procedures as outlined in the district court's order. It's a matter up to the district court's discretion, and it's not an abuse of discretion for the district court to look at the evidence before it—including the stipulation—and find that it did not, after all, need to hear from Fischer in order to grant Pidgeon's petition.

And as circuit courts have observed in many other cases, the district court's procedural orders and local rules are its own to enforce, and its decision to relax the standard is not a basis for the losing party to seek reversal. *See* Fed. R. Civ. P. 83; *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 214 (3d Cir. 2000) (discussing district court's inherent authority to depart from its own rules); *Somlyo v. J. Lu-Rob Enter., Inc.*, 932 F.2d 1043, 1048 (2d Cir. 1991) ("The district court's inherent discretion to depart from the letter of the Local Rules extends to every Local Rule regardless of whether a particular Local Rule specifically grants the judge the power to deviate from the Rule."). The State's argument that Pidgeon didn't comply with the court's directive is a fine argument to make to the district court—and the State did. *See* R.44:5–9. But the fact that the district court didn't deny Pidgeon's petition on that basis doesn't stand as a ground to reverse.

3.2 Wisconsin's procedure under *Machner* does not place a corresponding duty on federal evidentiary hearings.

The State's brief also relies heavily on Wisconsin's long-standing procedure in *Machner* hearings and argues that honoring state procedure should have resulted in denial of Pidgeon's habeas petition. St. Br. at 18. But again, *Machner* is not a constitutional standard, and *Strickland v. Washington,* 466 U.S. 668 (1984) and its progeny do not make any such demand on federal courts. Rather, *Machner* hearings are a creature of state procedure. A petitioner's failure to abide by it may, with certain provisoes, be enough to deny a petition on a state procedural ground of waiver without reaching the merits of a defendant's claim. *See Morales v. Boatwright*, 580 F.3d 653, 661–62 (7th Cir. 2009) (discussing Wisconsin's procedures under *Machner* and the limits of waiver to a defendant failing to raise the claim in the first instance). That would, of course, be an independent and adequate state ground to deny the petition in state court. *Promotor v. Pollard*, 628 F.3d 678, 886–87 (7th Cir. 2010) (finding "Wisconsin waiver law . . . constitutes an adequate and independent state law ground" barring federal habeas corpus).

But it's a far cry to say that a state procedure creates a corresponding duty in federal court. It doesn't. When the state courts haven't reviewed the merits of a petitioner's constitutional claim, a federal court must examine the entire record and decide the constitutional issue before it. *Cone v. Bell*, 556 U.S. 449, 472 (2009). The

federal court doesn't have to do so with the same procedures employed by the state court. The state doesn't cite to a single case that dictates that, nor has counsel found any. The closest analogy for the opposite proposition would be that when deciding a § 2254 petition, federal courts apply the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *See* Fed. R. Evid. 1101(e); *Mayle v. Felix*, 545 U.S. 644, 654 (2005); Fed. R. Hab. P. 12 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.").

Putting that aside, what the State's argument really tries to do is build a quasi-comity argument around the *Machner* hearings—that is, the district court had to respect Wisconsin procedure and follow *Machner* whenever they decide a habeas petition. But comity only applies to reviewing a state court's decision and deciding whether the denial of a petition could stand as an independent and adequate state ground. *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (noting the statute's design is to "further the principles of comity, finality, and federalism."). It does not demand that the federal court graft the state's procedures into federal court. *See United States ex rel Barskdale v. Blackburn*, 610 F.2d 253, 259 (5th Cir. Unit B 1980) ("But comity does not govern the application by federal courts of their independent judgment as to federal law."(quotation omitted)). Nor has the State cited a blanket rule that failure to abide by the *Machner* procedures can never be excused. That is not

actually the case since Wisconsin courts have discretion to reverse unpreserved errors. *See State v. Cuyler*, 327 N.W.2d 662, 666–67 (Wis. Sct. 1983). And this Court has found attorneys ineffective in Wisconsin cases without there previously being a *Machner* hearing. *See Kerr v. Thurmer*, 639 F.3d 315, 328–29 (7th Cir. 2011), *overruled on other grounds by Thurmer v. Kerr*, 132 S.Ct. 1791 (2012). And habeas relief has been granted in cases arising out of Wisconsin when the trial attorney had died and could not testify at the hearing. *Toliver v. Pollard*, 688 F.3d 853, 858 (7th Cir. 2012) ("Mr. Toliver's trial counsel, having died in the 1990's, did not testify at the evidentiary hearing."). Thus, an attorney's failure to testify at a *Machner* hearing cannot stand as a quasi-jurisdictional bar to granting relief.

In sum, there is no basis to find that as a matter of law Pidgeon's failure to follow the strictures of Wisconsin post-conviction procedure mean that he can't prevail on his federal claims. To hold otherwise would be to expand AEDPA and make federal courts not only determine the question of a constitutional violation but also whether in making that determination it has followed the state's procedures to a "T." State courts make that determination for themselves: federal courts have enough to deal with when it comes to the constitutional question.

3.3. The State surveys the law governing performance and prejudice but does not explain how the court erred.

Over the course of several pages, the State outlines the law on ineffective assistance of counsel. We take no qualms with it. The law is clear: "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing profession norms,' not whether it deviated from best practices of most common custom." *Harrington v. Richter*, 131 S.Ct. 770, 778 (2011). But the State never explains how the district court erred in finding that Fischer did not fall into the former category.

As an attorney, Fischer had a very simple task: give Pidgeon a basic idea of what he faced. *United States v. Martinez*, 169 F.3d 1049, 1053 (7th Cir. 1999); *Julian*, 495 F.3d at 495 ("A reasonably competent attorney will attempt to learn all of the facts of the case, make an estimate of the likely sentence, and communicate the result of that analysis before allowing the client to plead guilty."). To provide that advice he had to look at the statute and read it. At some point, Fischer talked with the district attorney and became concerned that Pidgeon faced mandatory life imprisonment. A comment about mandatory life from a respected district attorney who would soon ascend to the bench should rightly give a defense attorney pause and prompt further research. But Fischer didn't do that. He paused but didn't follow up with the bare minimum of research that would have shown he did not

qualify for mandatory life. Nor, for that matter, would a conviction in Columbia County be an offense that, even supposing he had two qualifying priors, exposed him to mandatory life.

Fischer didn't simply make a bad call about trial strategy or have his cross-examination of the pivotal witness fall flat—that happens. *See Wooley v. Rednour*, 702 F.3d 411, 423–24 (7th Cir. 2012). No, he got the most basic task of an attorney wrong. *See Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) ("When the . . . consequence is truly clear . . . the duty to give correct advice is equally clear."); *see also Hutchings v. United States*, 618 F.3d 693, 698 (7th Cir. 2010) (noting "objective evidence of prejudice" includes "clearly erroneous readings of the applicable law"). The Constitution doesn't give defendants the right to an attorney like Edward Bennett Williams—or in Wisconsin, the esteemed Jim Shellow—it only demands minimal competence. See *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985) ("Counsel need not be perfect, indeed not even very good, to be constitutionally adequate."). Minimal competence, at the very least, provides that an attorney get the law part right. *See Julian*, 495 F.3d at 498. This Court has made that point clear: "Where 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 v. Bryant*, 348 F.3d 238, 242–43 (7th Cir. 2003). And here, Fischer didn't get the law right, not even close, and with a bit of effort he would have learned the truth about the penalties that Pidgeon faced. The district court correctly recognized that, and the State provides nothing that calls into question the fact that this error fell beneath the prevailing professional norms.

Concerning prejudice, the State argues that Pidgeon's testimony was self-serving and speculates that even with the error he got a good deal. First, the judge who listened to the testimony found it credible. So while it may have been self-serving, it was credible, it was backed up by objective evidence, and that is enough. *Cf. Foster v. United States*, 735 F.3d 561, 566 (7th Cir. 2013). Second, the State hasn't attempted to make the argument that the judge erred in crediting Pidgeon's testimony. The standard is too high. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (noting that a finding is "clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (quotation omitted); *see also Ray v. Clements*, 700 F.3d 993, 1013 (7th Cir. 2012) (finding this standard when the district court's findings are for lack of a better word, "implausible"(quotation omitted)).

So that leaves the State's argument that Pidgeon got a good deal and to correctly determine prejudice the district court needed to hear Fischer's thoughts on the deal. St. Br. at 22–25. But whether Pidgeon got a "good deal" is not the standard for prejudice. The issue is whether there was a substantial probability that he would have gone to trial. *See Julian*, 495 F.3d at 498. And it's not whether he would have won or even had a good shot, but whether he would have gone. *See Ward v. Jenkins*, 613 F.3d 692, 700 (7th Cir. 2010) (noting the court "need not assess the likely success of [defendant's] defense; [his] claim that he would have insisted on going to trial to pursue it is enough."); *Castellanos v. United States,* 26 F.3d 717, 719 (7th Cir. 1994) (prejudice where lawyer failed to carry out client's instruction to file an appeal regardless of chances of success). On that point, Pidgeon was credible and his commitment to taking the case to trial was supported by independent evidence. Further, Fischer's thoughts on the plea deal are of no moment. In his view, he got a great result. He spared his client from mandatory life, all for a mere dime in prison. Whether Fischer thought he did a great job or a poor one doesn't change what the district court had to find and did find: "that [Pidgeon] would not have pleaded guilty to second degree sexual assault in Dodge County had his counsel not given him incorrect information." R.46:3.

Finally, much in the record supported the district court's finding, not the least of which was Pidgeon's testimony. But even taking a step back from that and

looking at what this Court has used to find prejudice before, the district court did not err in finding that Pidgeon meets the standard. This Court has explained that "[t]he chances of prejudice need only be better than negligible." *Julian*, 495 F.3d at 498. This inquiry is informed by context. *Id.* Among the considerations, this Court has weighed the difference between the actual potential time that a defendant faced and what his attorney advised him on. *See Moore*, 348 F.3d at 242–43 (an erroneous sentencing prediction of nearly double the time the defendant would actually have faced had he proceeded to trial is precisely the type of information that is likely to impact a plea decision) *Bethel*, 458 F.3d at 718–19 (discussing same and citing cases). And it has noted that the greater the difference between the two, the more likely it is that a client has suffered prejudice. Here, the difference is huge—a difference of 25 years versus life. *Moore*, 348 F.3d at 242–43 (noting information about penalties is "precisely the type of information that is likely to impact a plea decision and is sufficient to objectively establish prejudice").

In addition, Pidgeon's initial trial demand, the transcripts and evidence about how the strategy changed with the mistaken belief that mandatory life was on the table, all support the district court's finding of prejudice. *Julian*, 495 F.3d at 498 (question becomes "whether the deficient information was the decisive factor in a defendant's decision to plead guilty or to proceed to trial."). Pidgeon's actions at the plea and sentencing also support a finding of prejudice. After all, he signed the

plea questionnaire and stipulation with a silent protest that he was only doing so under threats, duress, and coercion. All of this supports the district court's finding.

4.0 Conclusion

The problem with the State's argument can really be seen in its request for relief. It doesn't ask that this Court remand the case so it can call Fischer. Instead, it simply requests that the Court reverse because Pidgeon hasn't met his burden. The only way to say that Pidgeon hasn't met his burden is to hold that in no case can a petitioner show ineffective assistance of counsel unless his attorney testifies. Since no such rule exists, then the Court must look at the evidence as a whole, just as the district court did. And this Court must ask: did the district court err in its credibility findings? No—the State doesn't challenge them. Did the district court err in its legal analysis? No—it's legal analysis was sound. And since neither this Court, nor any court, has ever held that a federal district court must abide by a state's procedures or that it may never grant relief unless the defense attorney testifies, this Court must reject the State's arguments and affirm the district court's order granting the writ.

Dated at Madison, Wisconsin this 8th day of January, 2015.

Respectfully submitted,

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CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to CIRCUIT RULE 31(e), a version of this brief in non-scanned PDF format.

Dated: January 8, 2015

/s/ Joseph A. Bugni
Joseph A. Bugni
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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7), counsel for Petitioner-Appellee certifies that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) and (C). This brief contains 5,071 words.

Dated: January 8, 2015

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CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner-Appellee Curtis Pidgeon, hereby certifies that on January 8, 2015, two copies of the Petitioner-Appellee's brief, as well as a digital version of the brief via the Court's CM/ECF system, were delivered to Assistant Attorney General William L. Gansner, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857, counsel for the Respondent-Appellant in this action and to Curtis Pidgeon, via first class mail, postage pre-paid, to Mr. Curtis Pidgeon, Registration No. 043860, Oshkosh Correctional Institution, Post Office Box 3310, Oshkosh, Wisconsin 54903-3310.

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