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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1058-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

TERESA L. CLARK,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING A MOTION TO COLLATERALLY ATTACK A PRIOR CONVICTION, ENTERED IN THE ASHLAND COUNTY CIRCUIT COURT, THE HONORABLE JOHN P. ANDERSON, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUES PRESENTED

A defendant collaterally attacking a prior conviction on the ground that she was denied the right to counsel has the burden of proving that she did not waive counsel knowingly, intelligently, and voluntarily. A defendant shows a prima facie violation of her right to counsel by pointing to evidence—typically a transcript—showing that the circuit court failed to give her the information required for her to validly waive counsel, and alleging that she did not understand the information the court failed to give her. When a defendant makes this showing, the burden shifts to the State to prove that, notwithstanding the court's failure, the defendant waived counsel knowingly, intelligently, and voluntarily.

Teresa M. Clark was charged with operating a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC), both as fourth offenses. She collaterally attacked two of her prior convictions. No transcripts are available for the prior cases, and the court reporter's notes have been destroyed in accordance with the law. Clark alleged that the courts failed to adequately inform her of her right to counsel, but she did not point to evidence showing that the court failed to do so.

I. Does the burden shift to the State when the defendant does not point to evidence that *shows* that the circuit court failed to inform her of the right to counsel but merely *alleges* that the court failed to do so?

The circuit court answered "yes." It concluded that the burden shifts to the State based solely on a defendant's affidavit alleging that the circuit court failed to give her the information required for her to validly waive counsel, even though no evidence shows that the court failed to give her that information.

This Court should answer "no." If a defendant does not show a prima facie violation of her right to counsel with evidence that *shows* that the circuit court failed to give her the information required for her to validly waive counsel, the burden should not shift to the State to prove a valid waiver. A defendant who sufficiently alleges a violation of her right to counsel is entitled to a hearing, but she must prove that her right to counsel was violated.

II. Did Clark prove that her right to counsel was violated in her prior cases?

The circuit court answered "yes." It concluded that Clark satisfied her burden by alleging that the circuit courts in her prior cases failed to give her the required information, and that the burden shifted to the State. The court granted Clark's collateral attack motion because it concluded that the State did not then prove that Clark waived her right to counsel knowingly, intelligently, and voluntarily.

This Court should answer "no." Clark did not show that the circuit courts in her prior cases failed to give her the required information, so the burden should not have shifted to the State. Clark was entitled to a hearing, but she failed to prove that she did not waive counsel knowingly, intelligently, and voluntarily, so her collateral attack motion should have been denied.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication of this Court's opinion will likely be appropriate to provide guidance to circuit courts in deciding collateral attack motions when no evidence shows that a circuit court failed to give the defendant the information required for her to validly waive her right to counsel in a prior case.

INTRODUCTION

A circuit court accepting a defendant's waiver of counsel must be satisfied that the defendant understands her right to counsel and is waiving that right knowingly, intelligently, and voluntarily. In Wisconsin, a court is required to conduct a personal colloquy with the defendant to ensure a valid waiver of counsel.

When the State uses a prior OWI conviction to enhance the charge and sentence for a subsequent OWI offense, a defendant may collaterally attack the prior conviction. If the defendant proves that her right to counsel was violated in the prior case, the conviction may not be used to enhance the charge and sentence in the new case.

A defendant collaterally attacking a prior conviction must do two things to make a prima facie showing of a violation of her right to counsel. She must point to evidence showing that the court in the prior case failed to give her the required information to validly waive counsel—typically a transcript of the waiver hearing. And she must allege that she did not understand the information that the circuit court failed to give her. When the defendant makes this prima facie showing, the burden shifts to the State to prove by clear and convincing evidence that the defendant knew or understood the information the court failed to provide, and validly waived counsel notwithstanding the court's error.

The issues in this case concern what procedure applies when a defendant does *not* point to evidence *showing* that the circuit court failed to give her the required information but instead merely *alleges* that the court failed to do so. Circuit courts in Wisconsin routinely grant collateral attack motions in cases where a defendant does not point to evidence *showing* that the circuit court failed to give her the required information. Circuit courts routinely conclude that just as a defendant makes a prima facie showing of a denial of her right

to counsel by pointing to evidence *showing* that the circuit court failed to give her the required information, a defendant makes the same prima facie showing by merely *alleging* that the circuit court failed to give her the required information.

Courts reach this conclusion even though a presumption of regularity attaches to a final conviction. When a final conviction is collaterally attacked, courts should presume that the court in the prior case properly informed the defendant about the right to counsel, and was satisfied that the defendant was waiving her right to counsel knowingly, intelligently, and voluntarily. When a court shifts the burden to the State without evidence *showing* that the court properly informed the defendant, it is ignoring the presumption of regularity, and instead presuming that the circuit court in the prior case failed to ensure that the defendant was waiving her right to counsel knowingly, intelligently, and voluntarily. It is presuming, without any actual proof, that the prior circuit court accepted a waiver of counsel in violation of the defendant's right to counsel.

When a court shifts the burden to the State to prove that the defendant waived counsel knowingly, intelligently, and voluntarily, the State usually cannot satisfy this burden. Therefore, even when defendants cannot show that the circuit court in their prior cases erred in any way, their collateral attacks on their prior convictions are usually granted.

In this case, the circuit court granted Clark's collateral attack motion even though she pointed to no evidence—such as a transcript, showing that the circuit courts in her prior cases failed to give her the information required for her to validly waive her right to counsel. There are no transcripts or court reporter's notes for either of Clark's two prior cases. Clark alleged, but did not show, that the circuit courts failed to give her the information required for her to validly waive her right to counsel.

The circuit court concluded that Clark's allegation that the circuit courts in her prior cases failed to give her the required information, with no evidence showing that the courts actually failed to do so, was prima facie proof of the prior courts' failures. It therefore shifted the burden to the State to prove that Clark nonetheless waived her right to counsel knowingly, intelligently, and voluntarily.

The court concluded that the State did not show that Clark understood the information that she alleged (but did not show) that the prior courts failed to give her, so it granted Clark's collateral attack motion. Consequently, Clark's three prior final OWI convictions, those cannot be used to enhance the charge for her current OWI, or the sentence if she is convicted. If Clark is convicted of OWI in this case, she will not be sentenced for a fourth offense (a felony). She will be sentenced for a first offense (a civil forfeiture).

The State asks this Court to clarify that to shift the burden to the State under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), a defendant must show a prima facie violation of her right to counsel. She must overcome the presumption of regularity that attaches to a final conviction. To do so, a defendant must *show* that the circuit court failed to adequately inform her of her right to counsel and failed to ensure that she was waiving counsel knowingly, intelligently, and voluntarily. A defendant who merely alleges but does not point to evidence showing that the circuit court in the prior case failed to give her the required information in the prior case does not show a prima facie violation of her right to counsel.

When a defendant cannot show that the court in the prior case failed to give her the required information, the collateral attack motion should be resolved under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). If the defendant's allegations are sufficient, she is entitled to a hearing, but she retains the burden to prove that her right to

counsel was violated. In short, the State asks this Court to clarify that a defendant's mere *allegation* that a prior court failed to properly accept a defendant's waiver of counsel is not sufficient to prove the court failed, and shift the burden to the State to prove a valid waiver.

Clark alleged that the circuit courts in her prior cases failed to give her the required information, but she pointed to no evidence showing that the courts failed to do so. The *Bangert* burden-shifting procedure was therefore inapplicable. Clark's motion and affidavit were sufficient to entitle her to a hearing, but she should have retained the burden of proving that she did not waive counsel knowingly, intelligently, and voluntarily. She failed to satisfy her burden, so her motion should have been denied.

STATEMENT OF THE CASE AND FACTS

On July 5, 2018, at 2:06 a.m., Ashland County Sheriff's Deputies responded to a crash involving a car and a truck, both with major damage. (R. 11:2–3, A-App. 188–89.) R.N.S., told a deputy that she had been driving her car on State Highway 112 when a truck came into her lane, leaving her no time to react before the vehicles collided. (R. 11:3, A-App. 189.) R.N.S. said she never saw the truck's headlights. (R. 11:3–4, A-App. 189–90.) The deputy observed that the car's headlights were on, but the truck's headlights were not. (R. 11:3–4, A-App. 189–90.) R.N.S. told the deputies that after the crash, the other driver approached her, and said, "I am going to jail," and then left the scene. (R. 11:4, A-App. 190.) R.N.S. was later treated for injuries sustained in the crash. (R. 11:4, A-App. 190.)

After the deputies located Clark, she told them that the car hit her truck, and that she left the scene after the crash because she had been drinking and didn't want to go to jail. (R. 11:3, A-App. 189.) A deputy detected a strong odor of intoxicants coming from Clark and observed that she had

slurred speech, glossy eyes, and unsteady balance. (R. 11:3, A-App. 189.) Clark said she had been drinking all day since about noon and stopped shortly before the crash when she left a bar, after about five drinks. (R. 11:3, A-App. 189.)

A deputy conducted standardized field sobriety tests and observed clues on each of the tests. Clark agreed to a preliminary breath test, which gave a result of 0.14. (R. 11:3–4, A-App. 189–90.) The deputy then arrested Clark for OWI and took her to a hospital where she agreed to a blood test which revealed an alcohol concentration of 0.194. (R. 11:4, A-App. 190.)

Clark's Wisconsin DOT driving record showed three prior OWI convictions, in Chippewa County in 1994, and in Eau Claire County in 1995 and 2002. (R. 11:3, A-App. 189.) The State therefore charged her with OWI and PAC, both as 4th offenses. (R. 11, A-App. 187–91; 15, A-App. 191–94.) It also charged her with OWI causing injury and PAC causing injury, both as 2nd or subsequent offenses. (R. 11, A-App. 187–91; 15, A-App. 191–94.)

Clark moved to collaterally attack her two Eau Claire County OWI convictions. (R. 29, A-App. 102–03.) In an affidavit, Clark's defense counsel asserted that the file for Clark's 1995 case has been destroyed pursuant to SCR 72.01(18) because 20 years have passed, and a transcript cannot be prepared for her 2002 plea hearing because the court reporter's notes are no longer available. (R. 30, A-App. 107–10.)

Clark claimed in an affidavit that she did not have an attorney in the two cases. (R. 31:1, A-App. 104.) She said the judges in those cases did not address her personally or conduct a colloquy in accepting her waiver of counsel. Clark alleged that she did not make a deliberate choice to proceed without counsel, that she did not know her rights, what an attorney could do for her, or the seriousness of the charges

and the penalties she faced by pleading guilty in both cases. (R. 31:2–3, A-App. 105–06.)

The State conceded that the allegations in Clark's motion and affidavit entitled her to a hearing. (R. 36; 67:4, A-App. 119.) But the State asserted that since Clark did not point to evidence showing that the courts in her prior cases failed to give her the information required for her to validly waive counsel, it should remain Clark's burden to prove that she was denied the right to counsel in those cases. (R. 36; 67:4, A-App. 119.)

At the hearing, Clark testified that the judges in her 1995 and 2002 cases never told her she had the right to counsel, or about the seriousness of the charges or the penalties she faced. (R. 67:6–8, A-App. 121–23.) Clark also testified that she did not know the information that she alleged the judges failed to give her. (R. 67:8–9, A-App. 123–24.)

The parties did not present any documents from the 1995 case because the record had been destroyed. The State presented four documents from the 2002 case: the criminal complaint, a bond sheet, and minutes sheets from the hearing at which Clark pleaded no contest to OWI as a third offense, and the hearing at which she was sentenced. (R. 37, A-App. 111; 38, A-App. 112; 39, A-App. 113; 40, A-App. 114–15.)

The criminal complaint indicated that Clark was charged with both OWI and PAC as third offenses and it listed the penalties for those charges. (R. 40:1, A-App. 114.) The complaint alleged that Clark was charged after crashing her vehicle, and that testing revealed that her alcohol concentration was .259. (R. 40:2, A-App. 115.)

On the minutes sheet for the plea hearing, boxes indicating that Clark appeared "without counsel," that she pleaded "No Contest" to OWI 3rd, and that "Def. advised of [her] right to attorney/constitutional rights" were checked.

(R. 39, A-App. 113.) The minutes sheet indicated that the PAC charge was dismissed but would be read in at sentencing. (R. 39, A-App. 113.)

The minutes sheet for the sentencing hearing indicated that the court imposed 55 days of jail with Huber and stayed the sentence. (R. 39, A-App. 113.) On the minutes sheet, boxes indicating that Clark appeared "without counsel," and that "Def. advised of [her] right to attorney/constitutional rights" were checked. (R. 38, A-App. 112.)

Clark acknowledged signing the bond sheet at her initial appearance, but she said did not know what she was signing. (R. 67:20–21, A-App. 135–36.) She also acknowledged receiving the criminal complaint, which listed the potential penalties she faced, but she said, "I don't know if I read it; I may have read it." (R. 67:26, A-App. 141.)

Clark acknowledged that the information on the minutes sheets for the plea and sentencing hearings were correct. (R. 67:30, 33, A-App. 145, 148.) But she said the judges did not advise her of her constitutional rights. (R. 67:37, 40, A-App. 152, 155.)

At the close of the hearing, the State asserted that Clark's convictions were final and should be presumed regular (R. 68:5, A-App. 175), and that Clark did not meet her burden of showing that she was denied the right to counsel in her prior cases (R. 68:6–7, A-App. 176–77).

Defense counsel told the court that because the State did not present evidence refuting it, Clark's testimony is "a verity." (R. 68:10, A-App. 180.) Counsel said, "this may seem unfair, but this is the law. This is the way it goes. And in order for the Court to deny this motion, you have to disavow all of the case law, throw out *Klessig*,[1] and imply things the State has not proven." (R. 68:10, A-App. 180.) Counsel said that

[1] *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

because the record does not prove that Clark was advised of her rights, "[t]he Court has little or no choice in this case just because of the proof issues." (R. 68:10, A-App. 180.)

The court said that "my suspicion is that the chances of what the defense is asking me to believe is not terribly great." (R. 68:12, A-App. 182.) The court said, "I found the defendant's credibility somewhat lacking on the stand because of her, just simply: I don't remember anybody telling me anything; nobody told me anything, type of comments." (R. 68:12, A-App. 182.) The court said it "has its suspicion about the veracity, about the truthfulness, of what I'm being told." (R. 68:12, A-App. 182) But the court concluded that "while I -- I have my suspicions about the truthfulness of what I'm being told, I don't have -- there's nothing in the record for it to be refuted, so I'm going to grant the motion for collateral attack." (R. 68:12, A-App. 182.)

The circuit court issued a written order stating that Clark met her burden to be entitled to a hearing, and the burden shifted to the State, which failed to prove that she waived counsel knowingly, intelligently, and voluntarily in her two prior cases. (R. 56, A-App. 101.) The order had the effect of reducing the OWI and PAC charges from 4th offenses (felonies) to 1st (civil forfeitures). And for the OWI and PAC causing injury charges the order has the effect of requiring the State to prove that Clark operated a motor vehicle with an alcohol concentration above .08, rather than above .02.

The State petitioned for leave to appeal the circuit court's order, and this Court granted the petition.

STANDARD OF REVIEW

Whether a defendant waived her right to counsel knowingly, intelligently, and voluntarily is a question of law reviewed de novo. *State v. Ernst*, 2005 WI 107, ¶ 10, 283 Wis. 2d 300, 699 N.W.2d 92. Whether a defendant has

satisfied her burden of showing a prima facie violation of the right to counsel also presents a question of law reviewed de novo. *Id.*

ARGUMENT

I. A defendant collaterally attacking a prior conviction has the burden to show that she did not validly waive counsel in the prior case. A defendant's mere allegation that the court failed to properly accept her waiver of counsel is not sufficient to shift the burden to the State to prove a valid waiver.

A. A circuit court that accepts a defendant's waiver of counsel is required to ensure that the waiver is knowing, intelligent, and voluntary.

A defendant charged with a crime is entitled to counsel at a plea hearing. *Iowa v. Tovar*, 541 U.S. 77, 87 (2004). A defendant may waive counsel. *Id*. In accepting a defendant's waiver of counsel, a trial court is required to give the defendant sufficient information to ensure that the waiver is knowing, intelligent, and voluntary. *Id*. at 87–88 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The Sixth Amendment is satisfied at the guilty plea stage when the trial court informs the person of the nature of the charges, the right to an attorney for the plea, and the potential penalties the person faces. *Id.* at 81. A court accepting a waiver of counsel, like a court accepting a waiver of the right to a trial, is required to create a record showing the waiver. *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

In Wisconsin, a trial court is required to conduct a personal colloquy to ensure that a waiver of counsel is knowing and voluntary. *Ernst*, 283 Wis. 2d 300, ¶ 20; *State v. Klessig*, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). In

addition to the information required by the Sixth Amendment, the court is also required to advise the defendant about the difficulties and disadvantages of self-representation. *Ernst*, 283 Wis. 2d 300, ¶ 14; *Klessig*, 211 Wis. 2d at 206. Before *Klessig*, a court was not required to conduct a colloquy with a defendant, but it was required that the record reflect the defendant's "deliberate choice to proceed without counsel," as well as "his awareness of the difficulties and disadvantages of self-representation, the seriousness of the charge or charges he is facing and the general range of possible penalties that may be imposed if he is found guilty." *Pickens v. State*, 96 Wis. 2d 549, 563, 292 N.W.2d 601 (1980), *overruled by Klessig*, 211 Wis. 2d 194.

In *Klessig*, the supreme court overruled *Pickens* "to the extent that we mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel." *Klessig*, 211 Wis. 2d at 206. The supreme court required a circuit court to "conduct a colloquy designed to ensure that the defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him." *Id.* In *Ernst*, the supreme court affirmed that the waiver colloquy mandated in *Klessig*, while not required by the Sixth Amendment, is required under the supreme court's superintending and administrative authority. *Ernst*, 283 Wis. 2d 300, ¶¶ 19–20.

B. A defendant collaterally attacking a prior conviction on the ground that her right to counsel was violated in the prior case must prove that she did not waive counsel knowingly, intelligently, and voluntarily.

When the State proposes to use the fact of a prior conviction to enhance the sentence for a subsequent offense, a defendant may collaterally attack the conviction. *State v. Hahn*, 2000 WI 118, ¶¶ 17, 28, 238 Wis. 2d 889, 618 N.W.2d 528. A collateral attack is "an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it." *Ernst*, 283 Wis. 2d 300, ¶ 22 n.5 (quoting *State v. Sorenson*, 2002 WI 78, ¶ 35, 254 Wis. 2d 54, 646 N.W.2d 354). A defendant may collaterally attack a prior conviction only on the ground of a violation of the constitutional right to counsel. *Ernst*, 283 Wis. 2d 300, ¶ 22 (citing *Hahn*, 238 Wis. 2d 889, ¶ 17).

A presumption of regularity "attaches to final judgments, even when the question is waiver of constitutional rights." *Parke v. Raley*, 506 U.S. 20, 29 (1993) (citing *Johnson*, 304 U.S. at 464. A defendant who collaterally attacks a prior uncounseled conviction has the burden of proving that she did not waive her right to counsel knowingly, intelligently, and voluntarily. *Tovar*, 541 U.S. at 92. "On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." *Parke*, 506 U.S. at 30. A court may therefore presume "that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained." *Id.*

C. When a defendant collaterally attacking a prior conviction makes a prima facie showing that her right to counsel was violated in the prior case, the burden shifts to the State to prove that she validly waived counsel.

In *Bangert*, 131 Wis. 2d 246, the Wisconsin Supreme Court established a burden-shifting procedure for plea withdrawal motions based on a circuit court's failure to comply with its mandatory duties in accepting a guilty plea. The supreme court held that a defendant moving to withdraw a plea on the ground that the court failed to give her the information required for a valid guilty plea has the initial burden of making a prima facie showing that the court failed to provide the required information. *Id.* at 274. When the defendant has "shown" a prima facie violation or failure by the court, and alleges that she did not know or understand the information the court failed to give her, the burden shifts to the State "to show by clear and convincing evidence that the defendant's plea was knowingly, voluntarily, and intelligently entered, despite the inadequacy of the record at the time of the plea's acceptance." *Id.*

In *Klessig*, the supreme court adopted the *Bangert* burden-shifting procedure for direct attacks on a conviction alleging an invalid waiver of counsel in which the waiver colloquy is inadequate. *Klessig*, 211 Wis. 2d at 207.

In *Ernst*, the supreme court adopted the *Bangert* burden-shifting procedure for collateral attacks on prior convictions when a defendant makes a prima facie showing that her right to counsel was violated in the prior case. *Ernst*, 283 Wis. 2d 300, ¶ 25. The supreme court relied on *State v. Hampton*, 2004 WI 107, ¶ 46, 274 Wis. 2d 379, 683 N.W.2d 14, for what a defendant must do to make a prima facie showing and shift the burden under *Bangert*. *Ernst*, 283 Wis. 2d 300, ¶ 25. In *Hampton*, the court said that in a claim "based upon

defects in the plea colloquy," a defendant "will rely on the plea hearing record." *Hampton*, 274 Wis. 2d 379, ¶ 47. And the burden shifts when "the defendant's motion shows a violation" of the trial court's mandatory duties, "*and* alleges that he in fact did not know or understand the information which should have been provided" in the previous proceeding. *Id.* ¶ 46. Once the burden shifts, the State must prove by clear and convincing evidence that the defendant waived counsel knowingly, intelligently, and voluntarily, notwithstanding the trial court's failure to adequately inform the defendant of her right to counsel. *Ernst*, 283 Wis. 2d 300, ¶ 27.

D. When no transcript showing a defective waiver of counsel is available, a defendant cannot show a prima facie violation of her right to counsel based on mere allegations, so the burden should not shift to the State.

The supreme court in *Ernst* explained that the *Bangert* burden-shifting procedure applies when the defendant makes a prima facie showing of a denial of a constitutional right, by pointing to evidence showing that the court in the prior case failed to give her the required information, and alleging that she did not understand the information the court failed to give her. *Ernst*, 283 Wis. 2d 300, ¶ 25. The court said nothing suggesting that a defendant can make a prima facie showing and shift the burden by merely alleging, rather than showing, that the trial court failed to give her the required information. The same burden-shifting procedure cannot reasonably apply in that situation, where the defendant does not "rely on the plea hearing record." *Hampton*, 274 Wis. 2d 379, ¶ 47.

In *Bangert*, the supreme court "implemented a new approach" to remedy a court's failure to comply with its required duties in accepting a guilty plea, *Bangert*, 131 Wis. 2d at 274. The court said that the burden shifts "Where the defendant has shown a prima facie violation of Section 971.08 or other mandatory duties, and alleges that he in fact

did not know or understand the information which should have been provided at the plea hearing." *Id.* The burden does not shift when the defendant *alleges* that the court failed in its mandatory duties and alleges that she did not understand the information that she *alleges* the court failed to give her. The burden shifts when the defendant *shows* that the court failed in its mandatory duties and alleges that she did not understand the information that she *shows* that the court failed to give her.

The Wisconsin Supreme Court has made it clear that the *Bangert* burden-shifting procedure does not apply when a defendant cannot show that the circuit court failed to give her the required information for her to waive a constitutional right.

In *Hampton*, the supreme court confirmed that the *Bangert* burden-shifting procedure does not apply when the defendant cannot *show* that the circuit court failed to give her required information: "*Bangert*-type cases are confined to alleged defects *in the record of the plea colloquy*." *Hampton*, 274 Wis. 2d 379, ¶ 51 (emphasis added). "The initial burden rests with the defendant to make a pointed showing that the plea was accepted without the trial court's conformity with § 971.08 or other mandatory procedures." *Id.* ¶ 46 (citing *Bangert*, 131 Wis. 2d at 274). "To obtain an evidentiary hearing based upon defects in the plea colloquy, the defendant will rely on the plea hearing record." *Id.* ¶ 47.

In *State v. Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334, the supreme court explained that "[i]n a *Bangert*-type case, the defendant points to a specific deficiency in the plea colloquy and asserts that he lacked the requisite understanding to make a knowing, intelligent, and voluntary plea." *Id.* ¶ 55. The court said, "Because evidence to support the defendant's motion is contained in the court transcript, the State bears the burden of proof in any *Bangert* hearing." *Id.*

In *State v. Negrete*, 2012 WI 92, 343 Wis. 2d 1, 819 N.W.2d 749, another plea withdrawal case, the supreme court explicitly rejected the argument that a defendant can *show* a prima facie violation of a constitutional right by merely *alleging* that the court failed to give her the information required for her to validly waive the right. *Id.* ¶¶ 20, 30–33.

The defendant in *Negrete* moved to withdraw his plea, alleging that the trial court failed to inform him about possible deportation upon conviction of a felony. *Negrete*, 343 Wis. 2d 1, ¶ 5. There was no transcript of the plea hearing. *Id.* ¶ 7. The supreme court concluded that because the defendant was unable to point to a defect in the plea colloquy, the *Bangert* burden-shifting procedure did not apply. *Id.* ¶ 20. In making this determination, the supreme court cited *Hampton* and *Ernst*. *Id.* ¶¶ 30–31. The court explained that the *Bangert* burden-shifting procedure applies "when: (1) the defendant can point to a plea colloquy deficiency evident in the plea colloquy transcript, and (2) the defendant alleges that he did not know or understand the information that should have been provided in the colloquy." *Id.* ¶ 19 (citing *Bangert*, 131 Wis. 2d at 274–75; *Hampton*, 274 Wis. 2d 379, ¶ 46).

The supreme court said that with no transcript showing a defect in a required colloquy, "*Bangert*'s burden shifting procedure is not applicable." *Id.* ¶ 20. The court reasoned that "the *Bangert* procedure is predicated on a defendant making 'a pointed showing' of an error in the plea colloquy by reference to the plea colloquy transcript." *Id.* ¶ 20 (citing *Hampton*, 274 Wis. 2d 379, ¶ 46). The supreme court noted that "*Bangert* contemplated a shift in the burden of proof from the defendant to the State based upon a showing of a deficiency in the plea colloquy transcript." *Id.* ¶ 30 (citing *Bangert*, 131 Wis. 2d at 274–75). The court added that "the necessary showing requires a defendant to point to specific deficiencies evident on the face of the plea colloquy transcript." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶ 51). The

court said that "the rationale underlying *Bangert*'s burden shifting rule does not support extending that rule to situations where a violation is not evident from the transcript." *Id.* ¶ 31. And the court recognized that "practically speaking, where there is no transcript of the plea colloquy, the showing required under *Bangert*, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made." *Id.* ¶ 32.

In *Ernst*, the supreme court adopted the same *Bangert* burden-shifting procedure that it has explained does not apply when a defendant cannot show a defect in the court's required colloquy. Nothing in *Ernst* even suggests that a defendant can make a prima facie showing and shift the burden without actually *showing* that the court in the prior case failed to give her the information required for her to validly waive counsel.

As explained above, the supreme court recognized in *Hampton*, *Balliette*, and *Negrete* that when a defendant moves to withdraw her plea but does not show that the trial court failed to give her the information required for a valid waiver of her right to a trial, she does not make a prima facie showing and the *Bangert* burden-shifting procedure does not apply. There is no reason to think that the rule for those plea withdrawal cases is somehow different than the rule for collateral attacks. After all, the supreme court in *Ernst* adopted the same *Bangert* burden-shifting procedure that it applies in plea withdrawal cases, and the same requirements for a prima facie showing. *Ernst*, 283 Wis. 2d 300, ¶¶ 25, 31 (citing *Hampton*, 274 Wis. 2d 379, ¶ 57; *Bangert*, 131 Wis. 2d at 274).

In addition, the information that a court is required to give a defendant for a valid waiver of counsel is very similar to the information the court must give for a valid guilty plea, and in most cases, the court will be conducting the waiver of counsel colloquy at the plea hearing. In both situations, the

court is required to inform the defendant of the seriousness of the charges and the potential penalties. *See Klessig*, 211 Wis. 2d at 206; Wis. Stat. § 971.08.

A defendant moving to withdraw her plea on the ground that the court violated section 971.08 by not informing her of the potential penalties would be required to show that the court failed to give her that information. It would make little sense for her to be all but certain to prevail on a collateral attack of the same conviction by merely alleging that the court failed to give her the same information about the potential penalties.

The State acknowledges that in *State v. Bohlinger*, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900, this Court concluded that a defendant can make a prima facie showing that she was denied the right to counsel without even alleging that the court's required waiver colloquy was defective. *Id.* This Court said that in *Ernst*, the supreme court did "not hold that a defendant must allege a defective colloquy in order to state a prima facie case." *Id.* ¶ 18. This Court concluded in *Bohlinger* that the defendant made a prima facie showing that his right to counsel was violated even though the trial court properly gave him all the information required for him to validly waive counsel, because he was intellectually incapable of understanding the information. *Id.* ¶ 20. This Court held that because the defendant was incapable of understanding the information the court gave him, and could not waive counsel knowingly, intelligently, and voluntarily, the burden shifted to the State to prove that he somehow had waived counsel knowingly, intelligently, and voluntarily. *Id.* ¶¶ 20–21.

Respectfully, while this Court correctly concluded that the defendant in *Bohlinger* was entitled to a hearing on his claim that his waiver of counsel was not knowing, intelligent, and voluntary, the court's reasoning, and particularly its

application of the *Bangert* burden-shifting procedure that the supreme court adopted in *Ernst*, was incorrect.

As this Court noted, in *Ernst*, the supreme court explained the type of allegations a defendant must make in order to make a prima facie showing of a violation of the defendant's right to counsel. *Bohlinger*, 346 Wis. 2d 549, ¶ 18 (citing *Ernst*, 283 Wis. 2d 300, ¶¶ 25–26). But *Ernst* did not say that those allegations *alone* would be sufficient to make a prima facie showing. In *Ernst*, a transcript of the plea hearing at which the defendant waived counsel in the prior case showed that the court had not conducted an adequate waiver colloquy. *Ernst*, 283 Wis. 2d 300, ¶ 6. In particular, the trial court said nothing about the difficulties and disadvantages of self-representation. *Id.* While the Sixth Amendment does not require a court to inform a defendant about the difficulties and disadvantages of self-representation, *id.* ¶ 15 (citing *Tovar*, 541 U.S. at 81), courts in Wisconsin are required to do so, *id.* ¶ 14 (citing *Klessig*, 211 Wis. 2d at 206). That is why *Ernst* addressed whether a collateral attack could be based on a violation of the *Klessig* requirements, rather than only on a violation of the Sixth Amendment right to counsel. *Id.* ¶¶ 22–26.

The supreme court in *Ernst* determined what procedures apply "when the defendant makes a sufficient prima facie showing on a collateral attack." *Ernst*, 283 Wis. 2d 300, ¶ 27. The court said that when the defendant has made a prima facie showing, "then the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was knowingly, intelligently, and voluntarily entered." *Id.* The supreme court thus adopted the *Bangert* burden-shifting procedure for a collateral attack on a prior conviction when the defendant made a prima facie showing that her right to counsel was violated in the prior case. *Id.* ¶¶ 25, 27. The supreme court also explained what a defendant must allege to make a prima facie showing of a

violation of the right to counsel when a transcript shows that the trial court failed to give the defendant the information required for her to validly waive counsel. *Id.* ¶¶ 25–26.

The supreme court in *Ernst* concluded that the defendant failed to make a prima facie showing that his right to counsel was violated in the prior case because he did not allege that he did not understand the information that the transcript showed the court failed to give him. *Id.* The burden therefore did not shift to the State and the defendant's collateral attack motion failed. *Id.*

Bohlinger demonstrates why the *Bangert* burden-shifting procedure is "confined to alleged defects in the record." *Hampton*, 274 Wis. 2d 379, ¶ 51. It simply makes no sense for the burden to shift to the State based on the defendant showing that she was incapable of waiving counsel knowingly, intelligently, and voluntarily, so that the State can attempt to prove that she waived counsel knowingly intelligently, and voluntarily.

Bohlinger is instead a perfect example of a motion that should be analyzed under *Bentley*, 201 Wis. 2d 303, rather than under *Bangert*, 131 Wis. 2d 246, because it does not depend on a showing of a violation of the court's required duties in accepting a waiver of counsel. *See Negrete*, 343 Wis. 2d 1, ¶¶ 3, 33. Under *Bentley*, if a defendant alleges sufficient facts in his motion that, if true, would entitle her to relief, she is entitled to a hearing to prove that she did not waive counsel knowingly, intelligently, and voluntarily, regardless whether the circuit court gave her the required information. The State will further discuss this type of motion, in section I. F. of this brief.

Because *Bohlinger*'s conclusion that the *Bangert* burden-shifting procedure can be applied without a showing that the trial court failed to provide information required for a waiver of a constitutional right is contrary to supreme court

opinions in *Bangert*, *Hampton*, *Balliette*, *Negrete*, and *Ernst*. This Court is required to follow those cases, rather than *Bohlinger*.

For all these reasons, just like a defendant moving to withdraw a plea on the basis of a court's failure to give her required information is required to make a prima facie showing and shift the burden to the State, a defendant collaterally attacking a prior conviction must show that the court failed to give her required information.

E. When a transcript of a waiver of counsel is not available for reasons other than the State's misconduct or negligence, a defendant collaterally attacking the prior conviction must overcome the presumption that a final conviction was regular, and that the court in the prior case performed its required duties in accepting the waiver.

In Wisconsin, court records in OWI cases are often destroyed long before a defendant moves to collaterally attack a prior conviction:

> The Supreme Court's Record Retention Rules provide a limited "shelf life" for court records that will be needed to counter collateral attacks of prior drunk driving convictions: (1) court reporter's notes are destroyed after ten years, SCR 72.01(47); (2) traffic forfeiture case files and related documents are destroyed after five years, SCR 72.01(24), (24a) and (24m); and (3) misdemeanor case files and related documents are destroyed after twenty years, SCR 72.01(18), (19) and (20).

State v. Drexler, 2003 WI App 169, ¶ 11 n.6, 266 Wis. 2d 438, 669 N.W.2d 182. The same is true in other states. *See, e.g.*, *People v. Galland*, 197 P.3d 736 (Cal. 2009) (Under Government Code Sections 68152 and 68153, records in non-capital cases may be destroyed after 10 years.). In Wisconsin, when a defendant does not appeal a conviction, a transcript is

generally not prepared. Since court reporters' notes are destroyed after ten years, SCR 72.01(47), it is not unusual for there to be no transcript showing a defendant's waiver of counsel at a plea hearing or a waiver hearing.

The issue that routinely arises is: what procedure should courts follow to decide collateral attack motions made after court reporter's notes, and transcripts if any were prepared, have been destroyed?

In *Drexler*, this Court said that "under Wisconsin law," when a transcript is unavailable, "a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel." *Drexler*, 266 Wis. 2d 438, ¶ 10. This Court relied on *State v. Baker*, 169 Wis. 2d 49, 485 N.W.2d 237 (1992), which it read as providing that "when a defendant mounts a collateral attack on a prior conviction challenging a denial of the right to counsel and there are no transcripts available, a defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel." *Drexler*, 266 Wis. 2d 438, ¶ 10 (citing *Baker*, 169 Wis. 2d at 77–78). This Court recognized that "the State is placed in an untenable position under *Baker* if a defendant collaterally attacking a prior conviction can meet his or her burden of proof by simply filing an affidavit recounting his or her version of what occurred five, ten, twenty or twenty-five years earlier." *Id.* ¶ 11 n.6. This Court said that "it is necessary for the supreme court to re-examine *Baker*." *Id.*

The State agrees that *Baker* should be re-examined if it is stands for the broad proposition that when a transcript is unavailable, a sufficient affidavit is always enough to shift the burden to the State. But the State respectfully asserts that in *Drexler* this Court read *Baker* too broadly. The *Baker* court considered the unique circumstance of a transcript that should have been available, but was lost, presumably by the State. The supreme court concluded that under that circumstance, a defendant's affidavit was sufficient to make a

prima facie showing. It did not provide that when there is no transcript by operation of law, a defendant can make a prima facie showing of a denial of her right to counsel, and shift the burden to the State, simply by alleging a denial of the right to counsel in an affidavit.

In *Baker*, the defendant had four convictions for operating a motor vehicle after revocation (OAR). *Baker*, 169 Wis. 2d at 56. He collaterally attacked two of them, the second and third convictions. *Id.* at 58.

The supreme court considered a transcript of the plea hearing for the third OAR conviction, which demonstrated that the defendant was not present when the trial court accepted his guilty plea. *Id.* at 71–73. The court applied the *Bangert* burden-shifting procedure, noting that in *Bangert*, it had "stated that when a defendant shows a prima facie violation of sec. 971.08, the state bears the burden of showing that the plea was entered knowingly, voluntarily, and intelligently." *Id.* at 74. The court concluded that the transcript of the plea hearing showed that the plea-taking process "facially violated sec. 971.08(1)." *Id.* at 75. The court concluded that since the defendant made a prima facie showing of a violation, "The burden thus shifts to the state to show that Baker knowingly, voluntarily and intelligently entered the plea and waived his constitutional rights." *Id.*

For Baker's second OAR conviction, which had been entered only four years previously, *id.* at 56, there was no transcript showing a violation of the trial court's duties in accepting the defendant's plea: "The transcript of the proceedings of this earlier conviction is not available; it has been lost." *Id.* at 76.

The defendant submitted an affidavit asserting that he had not waived counsel. *Id.* at 77. In analyzing the defendant's second OAR conviction, the court seemingly recognized that the *Bangert* burden-shifting procedure did

not apply, since the defendant did not show that the trial court had failed to conduct an adequate colloquy. The court did not even mention *Bangert* in analyzing the defendant's collateral attack on his second OAR conviction.[2]

The court instead fashioned a procedure to decide the collateral attack "under the circumstances." *Id.* at 77. The court concluded that with his affidavit, "Baker met his burden of production under the circumstances of this case." *Id.* at 78. The court noted that a conviction carries a presumption of regularity, but also that courts "indulge in every reasonable presumption against waiver of counsel." *Id.* at 76. The court rejected this Court's conclusion that since the transcript was lost, the defendant should have "attempted to reconstruct the trial record from court minutes, docket entries, and testimony of people who were present at the proceeding in question." *Id.* at 77. The court therefore concluded that the defendant made a prima facie showing because he "met his burden of production under the circumstances of this case." *Id.* at 78.

The "circumstances" in *Baker* included the fact that the transcript of the colloquy was lost. *Id.* at 76. The only evidence showing what the trial court did in accepting the defendant's plea was the minutes sheet, which showed only that the defendant was not represented and pled guilty. *Id.* at 76. The line on the minutes sheet stating, "All rights explained by the Court" was not marked. *Id.* And in 1986 when the defendant entered his plea, trial courts were not required to conduct a waiver-of-counsel colloquy to accept an uncounseled defendant's plea. That requirement was imposed in 1997. *See Klessig*, 211 Wis. 2d at 206.

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[2] In *State v. Negrete*, Justice Abrahamson, who authored *Baker*, said that *Negrete* was "not a *Bangert* case because there is no transcript." *State v. Negrete*, 2012 WI 92, ¶ 61 n.13, 343 Wis. 2d 1, 819 N.W.2d 749 (Abrahamson, C.J., dissenting).

The supreme court had no reason to presume that the trial court had informed the defendant of the right to counsel. After all, the court knew that in the third OAR case, the same trial court did not follow proper procedures to preserve the defendant's constitutional rights when accepting his plea. Instead, the trial court allowed the defendant's attorney to enter a guilty plea on the defendant's behalf, without the defendant even being present. *Id.* at 74. The supreme court therefore concluded that "under the circumstances of this case," where no transcript was available because it had been lost, the defendant made a prima facie showing that his right to counsel was violated. *Id.* at 78.

The supreme court in *Baker* was faced with a unique factual situation—where a transcript that should have been available was not, due to the State losing it—and it fashioned an appropriate procedure for that situation. That remedy is not appropriate in a case where the transcript is unavailable because ten years have passed and the court reporter's notes were destroyed in accordance with the supreme court rule, SCR 72.01.

Shortly after the Wisconsin Supreme Court issued its decision in *Baker*, the United States Supreme Court addressed the situation in Clark's case, where there is no transcript of a plea hearing, not because it was lost, but because the defendant did not appeal so it was never produced, and the court reporter's notes were destroyed according to law, in *Parke*, 506 U.S. 20 (1992), The Court concluded that on collateral review, the presumption of regularity that attaches to a final conviction overcomes the presumption against waiver of a constitutional right, *id.* at 30, and that a state may impose a burden of production on a defendant even when there is no transcript, *id.* at 34.

In *Parke*, the defendant was charged as a persistent felony offender in 1986, and he moved to exclude two predicate convictions from 1979 and 1981 "because the

records did not contain transcripts of the plea proceedings and hence did not affirmatively show that defendant's guilty pleas were knowing and voluntary." *Id.* at 23.

The Supreme Court recognized that a trial court may not accept "a defendant's guilty plea without creating a record affirmatively showing that the plea was knowing and voluntary," and that "the waiver of rights resulting from a guilty plea cannot be 'presume[d] . . . from a silent record.'" *Parke*, 506 U.S. at 29 (alterations in original) (quoting *Boykin* 395 U.S. at 242). But the Court declined "To import *Boykin*'s presumption of invalidity" to the collateral review of a conviction, because doing so would ignore the "'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Id.* at 29 (citing *Johnson*, 304 U.S. at 464, 468). The Court reasoned that "*Boykin* colloquies have been required for nearly a quarter century. On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." *Id.* at 30. The Court concluded that "[i]n this situation, *Boykin* does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained." *Id.*

Baker's reasoning and the procedure it set forth under the circumstances of that case is consistent with *Parke*. A defendant collaterally attacking a prior conviction must overcome the presumption of regularity attached to the conviction by "coming forward with evidence to make a prima facie showing." *Baker*, 169 Wis. 2d at 77. If no transcript of the prior hearing is available, but not because of the State's misconduct or negligence, the conviction should be presumed regular, and it is permissible to require the defendant to

present evidence showing that the court failed in its required duties. *Parke*, 506 U.S. at 32–34.

But if the transcript is unavailable due to the State's misconduct or negligence, like in *Baker* where the transcript was "lost," the defendant's affidavit alone is sufficient to shift the burden to the State to prove a valid waiver. *Baker*, 169 Wis. 2d at 76, 78.

The supreme court in *Baker* did not determine that in cases in which a transcript or a court reporter's notes are unavailable or destroyed, but not because of the State's negligence or misconduct, the defendant should be relieved of her burden of proving that her right to counsel was violated. Instead, the supreme court's decision in *Baker* should be limited to the situation presented in *Baker*—the State lost a transcript it should have been able to produce, and the defendant should not bear the burden of fixing the State's mistake. But in cases in which the transcripts were not prepared because the defendant did not appeal, and the court reporter's notes were destroyed according to law, the defendant should be required to overcome the presumption of regularity that attaches to a final conviction. *Parke*, 506 U.S. at 31. The Wisconsin Supreme Court recognized the same thing in *Negrete*, 343 Wis. 2d 1, ¶ 32.

Alternatively, if this Court concludes that *Baker* cannot be limited to its "circumstances"—a lost transcript—and that it stands for the proposition that whenever a transcript is unavailable a defendant can make a prima facie showing with an affidavit, this Court should decline to follow *Baker* and *Drexler* because those cases are inconsistent with *Parke*, and with subsequent supreme court decisions including *Hampton, Balliette, Negrete*, and *Ernst*. This Court is bound by more recent supreme court decisions. *See State v. Patterson*, 2009 WI App 161, 321 Wis. 2d 752, ¶ 15, 776 N.W.2d 602; *State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) ("When decisions of our supreme court appear to be

inconsistent, we follow the court's most recent pronouncement.").

F. A defendant collaterally attacking a prior conviction who cannot point to a transcript showing an invalid waiver of counsel, but who sufficiently alleges an invalid waiver, is entitled to an evidentiary hearing at which she can attempt to prove that her right to counsel was violated.

When a defendant moves for plea withdrawal and cannot show that the trial court in the prior case failed to give her the information required for her to validly waive the right to a trial, the *Bangert* burden-shifting procedure does not apply. Instead, a plea withdrawal motion is analyzed under *Bentley*, 201 Wis. 2d 303. *Negrete*, 343 Wis. 2d 1, ¶¶ 3, 33.

Bentley provides that when a defendant cannot point to evidence showing a defect in the trial court's required colloquy, a court applies a two-part test to determine whether to hold a hearing on the motion. "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." *Hampton*, 274 Wis. 2d 379, ¶ 55 (quoting *Bentley*, 201 Wis. 2d at 310). However, a court has discretion to deny a motion without a hearing "[1] if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or [2] presents only conclusionary allegations, or [3] if the record conclusively demonstrates that the defendant is not entitled to relief." *Id.* ¶ 52 (quoting *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972)).

In *Hampton*, the supreme court concluded that in a *Bentley*-type case the burden of proof is on the defendant and does not shift to the State if the defendant makes a sufficient prima facie showing. The court stated: "In *Bentley*-type cases, the defendant has the burden of making a *prima facie* case for an evidentiary hearing, and if he succeeds, he still has the

burden of proving all the elements of the alleged error." *Id.* ¶ 63.

In *Negrete*, the supreme court concluded that "where a defendant is unable to point to a defect evident on the face of a plea colloquy transcript because such transcript is unavailable, the more appropriate review of a motion to withdraw a guilty or no contest plea under Wis. Stat. § 971.08(2) is that set forth in *Bentley*." *Negrete*, 343 Wis. 2d 1, ¶ 33. The court added that "Allegations that are 'less susceptible to objective confirmation in the record' are particularly suited to a *Bentley*-type analysis, because the defendant is required to allege particular facts that would entitle the defendant to relief before the court is obligated to hold an evidentiary hearing on the motion." *Id.* (footnote omitted) (citing *Hampton*, 274 Wis. 2d 379, ¶ 51).

Just as the *Bangert* standard applies to both plea withdrawal motions and collateral attacks when the defendant makes a prima facie showing of a violation of a constitutional right, the *Bentley* standard, which applies when the defendant cannot make such a showing in a plea withdrawal motion, should also apply when the defendant cannot make a prima facie showing in a collateral attack.

The issue in a collateral attack where the defendant cannot point to evidence showing that the court failed to give her the required information for her to validly waive counsel is whether the defendant has alleged facts that, if true, would entitle her to relief. If the defendant's motion does not allege facts that would entitle her to relief, or presents only conclusory allegations, or if the claim is conclusively disproved by the record, the circuit court has the discretion to deny the motion without a hearing. *Hampton*, 274 Wis. 2d 379, ¶ 52 (quoting *Nelson*, 54 Wis. 2d at 497–98).

"If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no

discretion and must hold an evidentiary hearing." *Id.* ¶ 55 (quoting *Bentley*, 201 Wis. 2d at 310). At the hearing, just like at a hearing on a motion for plea withdrawal, the defendant retains the burden of proving a violation of her constitutional right.

A collateral attack motion on a prior conviction based on something other than a defect in the waiver colloquy, should be analyzed under *Bentley*. For instance, the collateral attack motion in *Bohlinger*, 346 Wis. 2d 549, where the defendant alleged that he was intellectually incapable of waiving counsel knowingly, intelligently, and voluntarily, but did not dispute that the court gave him the information required for him to validly waive counsel, would be analyzed under *Bentley*. The *Bangert* burden-shifting procedure could not properly apply because the defendant did not show that the trial court failed to give him the required information. There would be no point shifting the burden to the State to prove that the defendant understood the information the court failed to give him, when the court in fact gave him the required information. Instead, if the defendant sufficiently alleged that he did not waive counsel knowingly, intelligently, and voluntarily, notwithstanding that the court gave him the required information, he would be entitled to a hearing at which he could prove his claim.

II. Clark failed to prove that she was denied the right to counsel in her prior cases, so her collateral attack motion should have been denied.

A. Clark did not show a prima facie violation of her right to counsel in her prior cases, so the *Bangert* burden-shifting procedure did not apply.

In her collateral attack motion, Clark alleged that she did not waive counsel knowingly, intelligently, and

voluntarily. (R. 29:2, A-App. 103.) She alleged that she did not make a deliberate choice to proceed without counsel, she did not understand the difficulties and disadvantages of proceeding without counsel, and she did not know the seriousness of the charges against her or the penalties she faced. (R. 29:2, A-App. 103.) In her affidavit, Clark made similar assertions, and also asserted that the circuit court in her prior cases did not personally address her and give her information about the difficulties and disadvantages of proceeding without counsel, the seriousness of the charges against her, or the penalties she faced. (R. 31, A-App. 104–06.)

Clark acknowledged that shifting the burden to the State when she did not point to evidence showing that the circuit courts in her prior cases failed to give her the required information and ensure she was waiving counsel knowingly, intelligently, and voluntarily "may seem unfair." (R. 68:10, A-App. 180.) But, he added, "this is the law. This is the way it goes." (R. 68:10, A-App. 180.) Counsel said that because the record does not prove that Clark was advised of her rights, "The Court has little or no choice in this case just because of the proof issues." (R. 68:10, A-App. 180.) The circuit court reluctantly agreed. (R. 68:12, A-App. 182.)

However, it makes no sense to shift a defendant's burden to the State because the defendant did not appeal a final conviction and transcripts were therefore not prepared, and the court reporter's notes have been destroyed in accordance with the law. As the Supreme Court recognized in *Parke*, "serious practical difficulties will confront any party assigned an evidentiary burden," when a transcript is unavailable. *Parke*, 506 U.S. at 31. The Court also recognized that the State will not have superior access to such records, and that in a collateral attack, "we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant." *Id.* at 32. The Court added that "it defies

logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights." *Id.* at 30.

The burden should not have shifted to the State. Clark did not point to any evidence *showing* that the circuit courts in her prior cases failed to give her the required information. A final judgment is presumed regular. *Parke*, 506 U.S. at 29; *Baker*, 169 Wis. 2d at 76. It is therefore presumed that a court accepting a waiver of counsel performed its required duties in accepting the waiver and was satisfied that the defendant pleaded guilty or waived the right to counsel knowingly, intelligently, and voluntarily. To overcome that presumption, a defendant must show that the court did not perform its required duties. As the supreme court has recognized, "practically speaking, where there is no transcript of the plea colloquy, the showing required under *Bangert*, relying on evidence in a transcript of defects in the plea colloquy, simply cannot be made," *Negrete,* 343 Wis. 2d 1, ¶ 32, "because there is no evidence in the record that the court did not comply." *Id.* (citing *Hampton*, 274 Wis. 2d 379, ¶ 51.) Because Clark failed to "show[ ] a prima facie violation" of the courts' required duties in her prior cases, *Bangert*, 131 Wis. 2d at 274, she failed to overcome the presumption of regularity that applies to a final judgment, and the *Bangert* burden-shifting procedure should not have been applied.

B. Clark's allegations were sufficient under *Bentley* to entitle her to an evidentiary hearing.

Because Clark did not overcome the presumption of regularity that attached to the judgments of conviction in her prior cases by showing a prima facie violation of her right to counsel in those cases, the *Bangert* burden-shifting procedure was inapplicable. Instead, her motion should be resolved

under *Bentley*. "Allegations that are 'less susceptible to objective confirmation in the record' are particularly suited to a *Bentley*-type analysis, because the defendant is required to allege particular facts that would entitle the defendant to relief before the court is obligated to hold an evidentiary hearing on the motion." *Negrete*, 343 Wis. 2d 1, ¶ 33 (footnote omitted) (quoting *Hampton*, 274 Wis. 2d 379, ¶ 51.)

Clark's motion and affidavit were sufficient to warrant an evidentiary hearing. In her motion, Clark alleged that she did not make a deliberate choice to proceed without counsel, and she did not understand the difficulties and disadvantages of proceeding without counsel, or know the seriousness of the charges against her and the penalties she faced. (R. 29:2, A-App. 103.) In her affidavit, Clark asserted that the circuit courts did not personally address her and give her information about the difficulties and disadvantages of proceeding without counsel, the seriousness of the charges against her, or the penalties she faced, and that she did not understand the information that she alleged the court failed to give her. (R. 31, A-App. 104–06.) These allegations, if true, would prove that Clark was denied the right to counsel. She was therefore entitled to an evidentiary hearing to prove her claim.

C. At the evidentiary hearing, Clark did not prove that she was denied the right to counsel in her prior cases.

At the hearing on her motion, Clark had the "burden to prove that [she] did not competently and intelligently waive [her] right to the assistance of counsel." *Tovar*, 541 U.S. at 92.

To satisfy her burden, Clark had to overcome the presumption of regularity that attaches to a final conviction, *Parke*, 506 U.S. at 31. Wisconsin courts have been required to ensure that waiver of counsel is knowing, intelligent, and voluntary since at least 1980, *Pickens*, 96 Wis. 2d at 564, and

have been required to conduct personal waiver colloquies since 1997, *Klessig*, 211 Wis. 2d at 206. A court therefore should presume that the circuit court in Clark's 2002 case conducted a personal waiver colloquy with her, and that the courts in both cases ensured that her waiver was knowingly, intelligent, and voluntary.

Although it should not have had the burden to prove that Clark was denied the right to counsel, the State provided evidence relating to Clark's 2002 conviction verifying that the circuit court performed its required duties when it accepted Clark's waiver of counsel. The minutes sheets indicate that the court informed Clark of her right to counsel and her other constitutional rights at the plea hearing and at sentencing. (R. 38, A-App. 112; 39, A-App. 113.) And the criminal complaint listed the penalties Clark faced. (R. 40, A-App. 114–15.) Although Clark said the judge did not tell her anything, she acknowledged that the minutes sheets were correct (R. 67:37, 40, A-App. 152, 155.)

The circuit court did not find Clark's testimony that the courts in both of her cases told her essentially nothing credible. The court said that "my suspicion is that the chances of what the defense is asking me to believe is not terribly great." (R. 68:12, A-App. 182.) The court said, "I found the defendant's credibility somewhat lacking on the stand because of her, just simply; I don't remember anybody telling me anything; nobody told me anything, type of comments." (R. 68:12, A-App. 182.) The court said that it "has its suspicion about the veracity, about the truthfulness," of Clark's testimony. (R. 68:12, A-App. 182.)

Clark's testimony, which the court did not even find credible, was plainly insufficient to prove that she was denied the right to counsel in her two prior cases. It was insufficient to overcome the presumption of regularity that attaches to her final convictions, and the presumption that the courts in those

cases performed their well-established duties in accepting her waiver of counsel.

Clark's testimony was not like the testimony in *Bohlinger*, 346 Wis. 2d 549, where the defendant proved that, even if the circuit court properly informed him of his right to counsel and was satisfied that he was waiving counsel knowingly, intelligently, and voluntarily, his waiver of counsel was not knowing, intelligent, and voluntary. *Id.* ¶ 20. The defendant in *Bohlinger* proved that, although the court did not err in any way, he was incapable of validly waiving counsel. That would properly have been resolved under *Bentley*, and the collateral attack motion should have been granted because the defendant satisfied his burden of proving that he did not waive counsel knowingly, intelligently, and voluntarily.

In contrast, Clark did not prove that she could not waive her right to counsel knowingly, intelligently, and voluntarily. The circuit court should have presumed the regularity of Clark's final convictions. It should have presumed that the courts properly informed her of her right to counsel, and were satisfied that she was waiving counsel knowingly, intelligently, and voluntarily. Clark's self-serving testimony, which the circuit court did not find credible, did not overcome the presumption of regularity that attaches to the final convictions, and in the 2002 case, the minutes sheets that verify that the court did what it was required to do—advise her of her constitutional rights including her right to counsel.

Clark did not prove that she did not waive counsel knowingly, intelligently and voluntarily, so the circuit court should have denied her collateral attack motion.

CONCLUSION

This Court should reverse the circuit court's order granting Clark's collateral attack motion.

Dated this 13th day of November 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,902 words.

Dated this 13th day of November 2020.

Electronically signed by:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 13th day of November 2020.

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