WISCONSIN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Appellant,

Case No.
2020AP1058-CR

v.

TERESA L. CLARK,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

ON APPEAL FROM CIRCUIT COURT FOR ASHLAND COUNTY THE HONORABLE JOHN P. ANDERSON PRESIDING

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STATEMENT OF ISSUES

I. Did the circuit court correctly grant Ms. Clark's motion collaterally attacking her 1995 and 2002 Eau Claire County operating while intoxicated ("OWI") convictions?

ANSWERED: Yes. Ms. Clark made a prima facie showing that her right to counsel was violated in the previous proceedings.[1] Therefore, the burden shifted to the State to prove by clear and convincing evidence that Ms. Clark's waivers were knowing, intelligent, and voluntary. The State fell far short of meeting that burden. Accordingly, the circuit court correctly granted Ms. Clark's collateral attack motion. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Clark respectfully submits that neither oral argument nor publication is necessary or appropriate. The State's arguments are plainly contrary to existing legal authority and are without merit. Moreover, the parties' briefs are fully sufficient to meet and present the issues.

[1] "Previous proceedings" refers to Ms. Clark's 1995 and 2002 Eau Claire County cases.

Regarding publication, this Court is being asked to do no more than apply well-settled law to a recurring fact situation. Furthermore, the issues on appeal are to be decided on the basis of controlling precedent that is sound and there is no reason for questioning or qualifying that precedent.

STATEMENT OF THE CASE AND FACTS

The State charged Ms. Clark with OWI-4th, OWI causing injury-2nd, and operating with a prohibited alcohol concentration-4th. (R. 5, pgs. 1-2; R. 11, pg. 1). The State alleged Ms. Clark had three prior countable OWI convictions: a 1994 conviction in Chippewa County, a 1995 conviction in Eau Claire County, and a 2002 conviction in Eau Claire County. (R. 5 at pg. 2).

Ms. Clark was unrepresented in both Eau Claire County cases. (R. 31, pg. 1). She filed a motion collaterally attacking her Eau Claire County convictions because: (1) she did not make a deliberate choice to proceed without counsel; (2) she was not aware of the difficulties and disadvantages of self-representation; (3) she was not aware of the seriousness of the charges against her; (4) she was not aware of the general range of penalties that could have been imposed on

her; and (5) she did not knowingly, intelligently, and voluntarily waive her right to counsel. (R. 29, pgs. 1-2).

In an affidavit submitted in support of her motion, Ms. Clark averred that:

- At no time during the previous proceedings did the courts personally address her or perform a colloquy with her regarding: (1) the difficulties and disadvantages of self-representation; (2) the seriousness of the charges against her; and (3) the general range of penalties that could have been imposed on her;
- At no time did the courts perform a colloquy with Ms. Clark to ensure she was making a deliberate choice to proceed without counsel;
- At no time did the courts advise her that a lawyer could be appointed to represent her if she could not afford one;
- She did not make a deliberate choice to proceed without counsel;
- She pled guilty simply to get the proceedings over with;

- She was extremely confused about the rights she was waiving;
- She did not know that a lawyer could have filed various motions in her defense, such as motions challenging the traffic stops that led to her arrests, statements she made to law enforcement, the constitutionality of her arrests, and motions relating to statutory, procedural, and evidentiary issues;
- She was unaware that a lawyer could have objected to the State's evidence, thereby assisting her defend against the State's allegations;
- She was unaware that a lawyer could have negotiated a more favorable plea bargain on her behalf or an outright dismissal of the charges;
- She was very confused about the proceedings and did not deliberately choose to proceed without counsel;
- She did not think a lawyer could have assisted her in an OWI case;

- She was unaware of the disadvantages of self-representation. For example, she was unaware that a lawyer could have filed the previously referenced motions;
- She was unaware how difficult it would have been for the State to prove her guilt beyond a reasonable doubt and that she had a reasonable chance of being acquitted;
- She is not a lawyer and lacks any legal training;
- She lacked the knowledge and skills necessary to properly defend herself;
- She was unaware of the seriousness of the charges she was facing;
- She was unaware that by pleading guilty she was exposing herself to enhanced penalties in the event she was convicted of a future OWI;
- She was unaware of the general range of penalties that could have been imposed on her and what those penalties entailed; and
- She did not knowingly, intelligently, and voluntarily waive her right to counsel.

(R. 31, pgs. 1-3).

Ms. Clark's lawyer also submitted an affidavit and a letter verifying that transcripts of the plea hearings in the previous proceedings were unavailable because the court reporters' notes were destroyed. (R. 30 and R. 41).[2] The parties obtained court records from the 2002 case. (R. 67, pg. 34). Court records from the 1995 proceeding, however, were destroyed and could not be produced. (R. 30, pg. 2).

On March 18, 2020, the circuit court held an evidentiary hearing on Ms. Clark's collateral attack motion. (R. 67, pg. 1). Ms. Clark testified at the hearing. (Id. at pgs. 5-42). Her testimony was consistent with her affidavit. Ms. Clark also added that:

- She was unaware she could have collaterally attacked her 1995 conviction in the 2002 proceeding (Id. at pg. 10);
- She was scared, by herself, and had no idea what was going on in the 2002 proceeding (Id. at pg. 20);

[2] The parties do not dispute that transcripts of the plea hearings in the previous proceedings are unavailable.

- She did not have a lawyer with her; for all she knew she was going to jail for years, she did what the court wanted her to do so she could stay out of jail; she had a child at the time and was a single parent (Id. at pg. 24);
- She wanted a lawyer to represent her (Id. at pg. 40);
- She was positive that nobody told her about her right to a lawyer or her constitutional rights (Id.);
- Had the courts instructed Ms. Clark regarding her rights, she would have thought more about hiring a lawyer (Id. at. pg. 8); and
- She never signed a plea questionnaire/waiver of rights form nor was she ever provided with such a form (Id. at pg. 42).

The State did not call any witnesses, but it did cross-examine Ms. Clark. (Id. at. pg. 11). The State introduced limited documents from the 2002 proceeding. (Id. at pg. 34). The State, however, did not and could not produce a plea questionnaire/waiver of rights form from either proceeding.

After considering the evidence and the arguments of counsel, the circuit court granted Ms. Clark's collateral attack motion. (R. 56 and R. 68, pg. 12). The circuit court found that Ms. Clark made a prima facie showing that her right to counsel had been violated in the previous proceedings. (R. 56). As such, the burden shifted to the State to prove by clear and convincing evidence that Ms. Clark's waivers were knowing, intelligent, and voluntary. *State vs. Ernst*, 2005 WI 107, ¶ 27, 283 Wis. 2d 300, 699 N.W.2d 92. The circuit court found that the State failed to meet its burden. (R. 56). The State now appeals.

SUMMARY OF ARGUMENT

This Court should affirm the circuit court's order granting Ms. Clark's collateral attack motion. Ms. Clark made a prima facie showing that her right to counsel had been violated in the previous proceedings. Furthermore, the State fell far short of proving by clear and convincing evidence that Ms. Clark's waivers were knowing, intelligent, and voluntary. Therefore, the circuit court correctly granted Ms. Clark's collateral attack motion.

The State urges this Court to overrule well-established and sound precedent regarding the burden of proof in

collateral attacks. Specifically, the State claims Ms. Clark should have retained the burden because transcripts of the plea hearings in the previous proceedings are unavailable. (State's Brief, pg. 33).[3] The State's proposed rule, however, is unsupported by law. In fact, the State's proposed rule is directly contrary to controlling precedent.

ARGUMENT

I. The State's Argument Regarding the Burden of Proof in Collateral Attacks is Unsupported by Law and Directly Contrary to Controlling Precedent

A. Standard of Review

In making a collateral attack, the defendant must first make a prima facie showing that she did not knowingly, intelligently, and voluntarily waive her constitutional right to counsel. *Id.* at ¶ 2. Whether a defendant has made this prima facie showing is a question of law for *de novo* review. *Id.* at ¶ 26.

B. Right to Counsel and Procedure for Collateral Attacks on Prior Convictions

"A criminal defendant in Wisconsin is guaranteed the fundamental right to the assistance of counsel for his defense

[3] Citations to page numbers in the State's brief correspond to the page numbers found at the bottom of the State's brief.

by both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution as made applicable to the states by the Fourteenth Amendment." *State vs. Klessig*, 211 Wis. 2d 194, 201-02, 564 N.W.2d 716 (1997). "The right to the assistance of counsel is necessary to ensure that a criminal defendant receives a fair trial, that all defendants stand equal before the law and, ultimately that justice is served." *Gideon vs. Wainwright,* 372 U.S. 335, 344 (1963).

A circuit court is required to undertake a colloquy with the defendant to ensure the defendant knowingly, intelligently, and voluntarily waived her right to counsel. *Klessig,* 211 Wis. 2d at 206. Before accepting a waiver of the right to counsel, a circuit court must conduct a colloquy to ensure 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. If the circuit court fails to conduct such a colloquy, a reviewing court may not find, based on the record, that there was a valid waiver of counsel." *Id.*

A defendant may collaterally attack a prior conviction in an enhanced sentence proceeding on the grounds that she was denied the constitutional right to counsel. *State vs. Hahn*, 2000 WI 118, ¶ 25, 238 Wis. 2d 889, 618 N.W.2d 528. In *Ernst*, our supreme court set forth the procedure that applies when a defendant attempts to collaterally attack a prior conviction. *Ernst,* 2005 WI at ¶ 2. First, the defendant must make a prima facie showing that her constitutional right to counsel was violated in the previous proceeding. *Id.* at ¶ 25. To do so, the defendant must point to facts demonstrating that she did not know or understand the information that should have been provided in the previous proceeding and, therefore, did not knowingly, intelligently, and voluntarily waive her right to counsel. *Id.* "An affidavit from the defendant setting forth such facts [is] necessary, in order to establish a prima facie case." *Id.* at ¶ 33.

If the defendant makes this prima facie showing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's waiver of counsel was knowing, intelligent, and voluntary. *Id.* at ¶ 27. "[T]he court should, at such a time, hold an evidentiary hearing to allow the State an opportunity to meets its burden." *Id.* If the State fails to meet

its burden, the defendant will be entitled to attack, successfully and collaterally her previous conviction. *Id.*

C. The State's Argument is Unsupported by Law

The State argues the rule in collateral attacks should be that of *State vs. Bangert,* 131 Wis. 2d 246, 389 N.W.2d 12 (1986) (a plea withdrawal case; not a collateral attack case), in which a defendant must show a defect in the court's required colloquy, on the face of a transcript. (State's Br., pgs. 17 and 30). The State further contends this Court in *State vs. Drexler,* 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182 and our supreme court in *State vs. Baker,* 169 Wis. 2d 49, 485 N.W.2d 237 (1992) erred in holding that a defendant's affidavit alone can support a prima facie showing in the absence of a transcript. (Id. at. pg. 23).

The thrust of the State's argument is that the absence of transcripts precludes Ms. Clark from making a prima facie showing that her right to counsel was violated in the previous proceedings. (Id. at. pgs. 17 and 30). The State's argument regarding the burden of proof in collateral attacks fails for multiple reasons.

Ernst held that a defendant collaterally attacking a prior conviction can establish a prima facie case through an

affidavit. *Ernst,* 2005 WI at ¶ 33. *Ernst* expressly stated that an affidavit is "necessary" in order to establish a prima facie showing that the defendant's right to counsel had been violated. *Id.* Indeed, the defendant's use of an affidavit is what triggers the State's right to question the defendant at a collateral attack evidentiary hearing. *Id.* at ¶¶ 33-35.

Contrary to the State's assertion, there is nothing in *Ernst* suggesting the burden-shifting procedure only applies to collateral attack motions when a transcript of the previous plea hearing exists. In fact, this Court has on numerous occasions applied the *Ernst* burden-shifting methodology to collateral attack motions when there is no plea hearing transcript. *See State vs. Krueger,* 2016AP2438-CR, unpublished slip. op., (WI App. May 25, 2017); *State vs. Schwandt,* 2011AP2301-CR, unpublished slip. op., (WI App. May 16, 2012); *State vs. Steinhorst,* 2011AP1360-CR, unpublished slip. op., (WI App. November 23, 2011).[4]

The State also misinterprets the holding in *Ernst*. The following are actual quotes from the State's brief. "As this Court noted, in *Ernst,* the supreme court explained the type of

[4] Pursuant to § 809.23(3)(b), *Krueger, Schwandt,* and *Steinhorst* are cited for their persuasive value.

allegations a defendant must make in order to make a prima facie showing of a violation of the defendant's right to counsel." (State's Br., pg. 20). "But *Ernst* did not say that those allegations alone would be sufficient to make a prima facie showing." (Id). In other words, the State claims *Ernst* requires a defendant to submit more than an affidavit to make a prima facie showing. This argument clearly lacks merit.

As stated, to make a prima facie showing, a defendant must point to facts showing that he or she did not actually know or understand the information that should have been provided in the earlier proceeding. *Ernst,* 2005 WI at ¶ 25. An affidavit containing these facts is necessary to make such a prima facie showing. *Id.* at ¶ 33. *Ernst* did not suggest that additional evidence, such as a transcript, let alone a transcript which is unavailable through no fault of the defendant, is necessary for a defendant to make a prima facie showing, thereby shifting the burden to the State. In fact, the defendant in *Ernst* supplied the circuit court with a transcript of his previous plea hearing. *Id.* at ¶ 26. The transcript, however, was insufficient to establish a prima facie case. *Id. Ernst* remanded to the circuit court to allow the defendant ". . . the

opportunity to file an affidavit and attempt to establish a prima facie case." *Id.* at ¶ 9.

If *Ernst* intended for the burden-shifting procedure to only apply to collateral attacks when transcripts are available, one would reasonably expect it would have stated as much. It did not. Rather, the *Ernst* burden-shifting procedure applies to all collateral attacks no matter if transcripts exist or not.

The State's proposed rule also conflicts with *Drexler.* In *Drexler*, the defendant averred he was not informed during prior proceedings "that he could have the court appoint counsel for him if he could not afford counsel, and the state or the county could be held responsible for paying the cost of appointed counsel." *Drexler,* 2003 WI App at ¶ 6. This Court held that a "defendant's affidavit is sufficient to establish a prima facie case of being denied the right to counsel" in a collateral attack. *Id.* at ¶ 10. Thus, "Once Drexler made this prima facie case . . . the burden was on the State to come forward with evidence countering Drexler's affidavit." *Id.*

Similarly, the State's proposed rule is in direct conflict with *Baker.* In *Baker,* the defendant averred he did not waive his right to counsel in a previous proceeding. *Baker,* 169 Wis. 2d at 77. A transcript of the previous proceeding could not be

produced. *Id.* at 58. *Baker* held that a defendant alleging he was deprived of counsel at a prior proceeding bears the initial burden of production and must make a prima facie showing that his right to counsel had been violated. *Id.* at 77. *Baker* further held that a defendant's affidavit is sufficient to make a prima facie showing. *Id.* at 77-78. Once a defendant makes this prima facie showing, the State has the burden of proving the defendant knowingly, voluntarily, and intelligently waived counsel. *Id.* at 78.

Furthermore, the State's argument is identical to the failed argument it made only six years ago in *State vs. Lebo*, 2014AP730-CR, unpublished slip. op., (WI App. April 7, 2015).[5] In *Lebo,* this Court and this very district, rejected the State's request to overrule *Drexler* and *Baker* and to otherwise radically change the burden of proof in collateral attacks. *Lebo* at ¶ 29. More specifically, this Court rejected the State's assertion that collateral attacks must be analyzed under plea withdrawal standards. *Id*. Thus, this Court has already dismissed the State's argument that a defendant making a collateral attack retains the burden if she cannot

[5] Pursuant to § 809.23(3)(b), *Lebo* is cited for its persuasive value.

produce the transcript from the plea hearing in the earlier proceeding. *Id.*

The State's failure to acknowledge *Lebo* is baffling. While Ms. Clark understands *Lebo* is an unpublished decision and, therefore, not precedent, its reasoning is sound and certainly persuasive. The issue presented in *Lebo* is identical to the issue in the present case. Just as it did in *Lebo,* the State argues collateral attacks should be analyzed under plea withdrawal standards. Rather than go down the State's plea withdrawal analogy rabbit hole, the defendant in *Lebo* aptly pointed out that neither this Court nor our supreme court has adopted a *Bangert* or *Nelson vs. State,* 54 Wis. 2d 489, 195 N.W.2d 629 (1972)/*State vs. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996) (plea withdrawal cases; not collateral attack cases) type rule in collateral attacks. This Court agreed, stating ". . . the State's argument regarding the burden of proof is not supported by existing law." *Lebo* at ¶ 29.

Lebo also observed that the State's proposed rule "would run contrary to *Baker* and *Drexler*, both of which held that a defendant's affidavit alone can establish a prima facie case that the defendant's right to counsel was violated, thereby shifting the burden of proof to the State." *Id.*

Similarly, *Lebo* recognized that the State's proposed rule would also conflict with *State vs. Bohlinger*, 2013 WI App 39, 346 Wis. 2d 549, 828 N.W.2d 900. *Id.* In *Bohlinger,* the defendant moved to collaterally attack two prior OWI convictions. *Bohlinger,* 2013 WI App at ¶ 2. He did not allege the waiver of counsel colloquies in those cases were facially deficient. *Id.* at ¶ 5. Rather, he argued he was unable to understand the information provided to him because of cognitive and learning disabilities. *Id.* The circuit court found that the defendant did not have the cognitive capability to waive his right to counsel in the previous proceedings. *Id.* at ¶ 13. Yet, the circuit court denied the defendant's motion because it did not allege the waiver colloquies in the prior cases were deficient. *Id.*

This Court reversed, stating, "While *Ernst* states that a defective colloquy 'can form the basis for a collateral attack' when supported by additional evidence, it does not hold that a defendant must allege a defective colloquy in order to state a prima facie case." *Id.* at ¶ 18. This Court remanded to the circuit court to hold an evidentiary hearing, at which the State would have the burden to prove that the defendant "in fact possessed the constitutionally required knowledge and

understanding to execute valid waivers of counsel." *Id.* at ¶ 21. Thus, *Bohlinger* applied the *Ernst* burden-shifting procedure despite the defendant's failure to allege any defect in the previous waiver of counsel colloquies. *Lebo* at ¶ 29.

Lebo further stated that ". . . while our supreme court has expressly distinguished between plea withdrawal motions that allege defects evident on the face of the plea hearing transcript and motions that set forth other bases for plea withdrawal, neither the supreme court nor this court has recognized a similar distinction in the context of collateral attack motions." *Id*.

Nothing has changed since *Lebo* that would warrant this Court in the present case reaching a different conclusion regarding the burden of proof in collateral attacks. *Drexler, Baker,* and *Bohlinger* all remain binding precedent. All of the Court's reasons for rejecting the State's argument in *Lebo* ring just as true today as they did when *Lebo* was decided.

The State also seeks to minimize *Baker*, insisting the holding in *Baker* was premised on the fact a transcript of the plea hearing was lost by the State. (State's Br., pgs. 23-26). The State erroneously claims that *Baker* only applies to collateral attack motions where the State loses a transcript it

should have been able to produce. (Id). The State's narrow and faulty interpretation of *Baker* is flat-out wrong.

Nothing in *Baker* even remotely suggests that a defendant's affidavit is sufficient to make a prima facie showing only when the State loses a transcript it should have been able to produce. Rather, *Baker* stands for the proposition that when a transcript is unavailable—regardless of why it is unavailable—a defendant's affidavit alone can be sufficient to make a prima facie showing. This interpretation of *Baker* was adopted by this Court in *Drexler. See Drexler,* 2003 WI App at ¶ 10.

Notably, the State advanced the same flawed argument regarding the *Baker* holding in *Lebo*. As this Court correctly noted, the holding in *Baker* was not premised on the fact the State lost a transcript it should have been able to produce. *Lebo* at ¶ 26, n.2. Even though this Court made it crystal clear that the State's interpretation of *Baker* was incorrect, the State still proceeds to misstate the *Baker* holding in this case.

The State devotes numerous pages of its brief discussing plea withdrawal cases. For reasons stated, the State's plea withdrawal analogy fails. No controlling

precedent supports the State's argument that collateral attacks must be analyzed under plea withdrawal standards.

The State voices its displeasure with *Ernst*, *Drexler*, *Baker,* and *Bohlinger* and takes the bold position that our supreme court and this Court incorrectly decided and interpreted those cases. (State's Br., pg. 23). The State fails to recognize, however, that there is no controlling precedent supporting its flawed argument regarding the burden of proof in collateral attacks. While the State may disapprove of *Ernst, Drexler, Baker,* and *Bohlinger*, those cases remain law and dictate the outcome in the present case. When *Ernst, Drexler, Baker*, and *Bohlinger* are applied, it is clear the circuit court correctly granted Ms. Clark's collateral attack motion.

In sum, the State's argument is unsupported by law and directly contrary to controlling precedent. This Court would have to disavow and/or overrule *Ernst, Drexler, Baker,* and *Bohlinger* for it to adopt the State's proposed rule. This Court cannot do so because its primary function is error correcting. *Cook vs. Cook,* 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). This Court is without authority to overrule, modify, or withdraw language from its prior published

decisions or decisions from our supreme court. *Id.* at 189-90. Accordingly, this Court should affirm.

D. The State's Reliance on *Parke* is Misplaced

The State cites *Parke vs. Raley,* 506 U.S. 20 (1992) numerous times throughout its brief. In doing so, the State cherry picks statements from the *Parke* decision and takes those statements out of context all in an effort to give the impression that *Parke* supports its meritless argument regarding the burden of proof applicable to collateral attacks. A close review of *Parke*, however, demonstrates that *Parke* actually undermines the State's argument.

In *Parke,* the defendant ("Raley") was charged with robbery and with being a persistent felony offender under a Kentucky statute that enhances sentences for repeat felons. *Parke,* 506 U.S. at 20. Raley brought a motion collaterally attacking two guilty pleas that formed the basis for the persistent felony offender charge. *Id*. He asserted these convictions were invalid because the records in those cases contained no transcripts of the proceedings and, hence, did not affirmatively show that the pleas were knowing and voluntary. *Id.*

Under Kentucky's procedures governing the collateral attack hearing, a presumption of regularity attached to the judgments once the government proved their existence. *Id.* As such, a defendant challenging a prior conviction under Kentucky law must meet an initial burden demonstrating that the convictions were obtained in violation of the defendant's right to counsel. *Id.* Once a defendant meets this initial burden, the ultimate burden of persuasion rests with the government to prove that the convictions are valid. *Id.*

Raley argued it was unconstitutional to require him to present any evidence supporting his collateral attack motion. *Id.* at 25. The United States Supreme Court disagreed, holding that Kentucky's burden-shifting scheme did not violate the Due Process Clause. *Id.* at 20. *Parke* held that the presumption of regularity would be improperly ignored if a defendant could collaterally attack a prior conviction without coming forward with any evidence that the prior conviction was invalid. *Id.*

The State erroneously argues that ". . . [*Parke]* addressed the situation in Clark's case. . ." (State's Br., pg. 26). *Parke*, however, is readily distinguishable.

Unlike Raley, Ms. Clark presented ample evidence that her right to counsel had been violated in the previous proceedings. She did this in two ways: by pointing to facts in a sworn affidavit and by providing sworn testimony, which subjected her to cross-examination from the State. Through her affidavit and testimony, Ms. Clark established various facts, including, but not limited to: that she was unrepresented in the previous proceedings, she did not know what she was doing during the previous proceedings, the courts did not advise her of her rights, including her right to a lawyer, the courts did not perform *Klessig* colloquies with her, she was unaware of the difficulties and disadvantages of self-representation, and she was unaware that a lawyer could have assisted her in defending the charges. In sum, the record demonstrates that Ms. Clark made a prima facie showing that her right to counsel had been violated.

In contrast, Raley was represented by counsel. *Id.* at 24. He admitted he understood the charges against him. *Id.* at 21. Raley testified that in one of the proceedings he signed a form specifying the charges to which he agreed to plead guilty. *Id.* at 24. This form advised Raley of the maximum penalties he faced. *Id.* Raley's counsel signed the form

verifying he fully explained Raley's rights to him. *Id.* Raley testified that one of the judges at least advised him of his right to a jury trial. *Id.* at 24-25. He did not testify the judges did not advise him of his other rights. *Id.* at 21. Instead, Raley testified he could not remember if the judges advised him of his other rights. *Id.* In short, Raley provided no evidence in support of his collateral attack motion.

Moreover, the legal issue in *Parke* differs substantially from the legal issue in the case at bar. Ms. Clark did not argue her collateral attack motion should be granted merely because transcripts of the previous proceedings were unavailable. She also did not argue it was unfair or unconstitutional that she was required to meet an initial burden of production. Instead, Ms. Clark acknowledged she had an initial burden to meet and she met this burden by presenting evidence showing that her right to counsel had been violated.

Not only is *Parke* distinguishable from the present case, *Parke* actually undermines the State's argument. Foremost, *Parke* did not hold that a defendant making a collateral attack must present more than an affidavit. *Parke* also did not hold that a defendant cannot meet her burden of production in the absence of a plea hearing transcript.

Importantly, *Parke* approved of Kentucky's burden-shifting procedure which is essentially the same procedure Wisconsin courts utilize in deciding collateral attack motions. *Parke* stated, "In recent years state courts have permitted various challenges to prior convictions and have allocated proof burdens differently. Some, like the Sixth Circuit, evidently place the full burden on the prosecution. Others assign the entire burden to the defendant once the government has established the fact of conviction. Several, like Kentucky, take the middle position that requires the defendant to produce evidence of invalidity once the fact of conviction is proved but that shifts the burden back to the prosecution once the defendant satisfies his burden of production." *Id.* at 32-33. (internal citations omitted).

Like Kentucky, Wisconsin also takes the middle position regarding the burden of proof in collateral attacks. Both require the defendant to first present evidence that the previous conviction is invalid. If the defendant meets this initial burden of production, the ultimate burden of persuasion shifts to the State to prove that the conviction is valid. *Parke* approved of this type of burden-shifting procedure, finding

that such a procedure does not violate the presumption of regularity. *Parke,* 506 U.S. at 20.

The State further claims *Drexler* and *Baker* are inconsistent with *Parke.* (State's Br., pg. 28). This argument rings hollow.

Parke held "[o]n 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 presumption of regularity makes it appropriate to assign a proof burden to the defendant even when a collateral attack rests on constitutional grounds." *Id.* at 31.

Drexler and *Baker* did not hold that a court can presume from the mere unavailability of a transcript that a defendant making a collateral attack was not advised of her rights. Similarly, neither *Drexler* nor *Baker* held that it is inappropriate to assign a proof burden to a defendant making a collateral attack. On the contrary, *Drexler* and *Baker* expressly held that a defendant collaterally attacking a prior conviction must meet an initial burden of production

establishing that the defendant's right to counsel was violated. *Drexler,* 2003 WI App at ¶ 10; *Baker,* 169 Wis. 2d at 77.

E. *Tovar* Provides No Support for the State's Position

The State cites *Iowa vs. Tovar,* 541 U.S. 77 (2004) for the proposition that "[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." (State's Br., pg. 13). By citing *Tovar* in this matter, the State gives the misleading impression that the United States Supreme Court requires every defendant making a collateral attack to satisfy the ultimate burden of persuasion. This is not the law.

Tovar was an Iowa case. *Tovar,* 541 U.S. at 77. Unlike Wisconsin, Iowa requires a defendant making a collateral attack to satisfy the burden of persuasion that she did not competently and intelligently waive her right to counsel. *Id.* at 92. The *Tovar* quote cited by the State is merely a restatement of law concerning the burden of proof in collateral attacks brought under Iowa law. *Tovar* does not stand for the proposition that a defendant must always satisfy the burden of persuasion in order to collaterally attack a prior conviction. As *Parke* discussed, states have allocated varying burdens of

production and persuasion in collateral attack motions. *Parke,* 506 U.S. at 32-33.

F. The Circuit Court Did Not Ignore the Presumption of Regularity, But the State Ignores that Courts are to Indulge in Every Reasonable Presumption Against Waiver of Counsel

The State alleges the circuit court ignored the presumption of regularity when it granted Ms. Clark's collateral attack motion. (State's Br., pg. 4). This argument fails.

By requiring a defendant to make a prima facie showing, the presumption of regularity is not ignored. Our supreme court addressed this precise issue in *Baker*. In *Baker,* our supreme court stated, "To determine whether this record is sufficient to support Baker's allegation that he did not validly waive his right to counsel, we must examine the interrelationship of two presumptions that conflict in this case. One presumption is that upon collateral attack a judgment carries with it a presumption of regularity. The other is that courts indulge in every reasonable presumption against waiver of counsel." *Baker,* 169 Wis. 2d at 76.

Baker further stated, "We resolve this apparent conflict of presumptions by applying the following burdens of

production of evidence and persuasion on the parties. Because the defendant must overcome the presumption of regularity attached to the prior conviction, the defendants bears the initial burden of coming forward with evidence to make a prima facie showing of a constitutional deprivation in the prior proceeding. If the defendant makes a prima facie showing of a violation of the right to counsel, the state must overcome the presumption against waiver of counsel and prove that the defendant knowingly, voluntarily, and intelligently waived the right to counsel in the prior proceeding." *Id.* at 77.

Baker clearly recognized these conflicting presumptions and set forth a burden-shifting procedure that harmonizes both rules. The *Baker* burden-shifting procedure is the same burden-shifting procedure in *Ernst.* The circuit court applied the *Ernst/Baker* burden-shifting procedure when it granted Ms. Clark's collateral attack motion. As such, the circuit court did not ignore the presumption of regularity.

While focusing exclusively on the presumption of regularity, the State ignores that courts must indulge in every reasonable presumption against waiver of counsel. As *Baker* explained, the presumption against waiver of counsel must be

given effect when a court decides a collateral attack motion. *Id.* at 77. The State's proposed rule, which is directly contrary to the rule in *Baker*, completely disregards the presumption against waiver of counsel.

G. The State's Assertion that the Circuit Court Concluded the Burden Shifted to the State Based Solely on Ms. Clark's Affidavit is Wrong

The State inaccurately asserts the circuit court "concluded that the burden shifts to the State based solely on a defendant's affidavit. . ." (State's Br., pg. 1). However, the Court's Order Granting Collateral Attack Motion, which was drafted by the State, provides that "***[a]s a result of the hearings***, the Court is satisfied the defendant met her burden." (emphasis and italics added). (R. 56). The inclusion of the phrase "as a result of the hearings" certainly suggests the circuit court found that Ms. Clark met her initial burden of production through her affidavit ***and*** testimony. In addition, there is nothing in the circuit court's oral ruling that suggests the circuit court found Ms. Clark made a prima facie showing based solely on her affidavit.

Moreover, the circuit court would not have erred even if it concluded that Ms. Clark met her burden of production solely through her affidavit. *See Drexler,* 2003 WI App at ¶

10; *Baker,* 169 Wis. 2d at 77-78. A defendant can make a prima facie showing without testifying. *Drexler,* 2003 WI App at ¶ 10.

II. Ms. Clark Made a Prima Facie Showing that Her Right to Counsel was Violated in the Previous Proceedings

The State argues Ms. Clark did not make a prima facie showing that her right to counsel was violated. In making this argument, the State merely rehashes its argument that the burden should not have shifted to the State because transcripts of the plea hearings in the previous proceedings are unavailable. (State's Br., pg. 33). Thus, the State does not contend Ms. Clark failed to make a prima facie showing under existing law. Rather, the State claims Ms. Clark failed to make a prima facie showing *only* if this Court adopts its position regarding the burden of proof in collateral attack motions. (Id.) Because the State's argument in favor of changing the burden of proof fails, the State's sub-argument that Ms. Clark did not make a prima facie case also fails.

The circuit court did not err in finding that Ms. Clark made a prima facie showing that her right to counsel had been violated. As summarized, Ms. Clark provided a detailed affidavit and gave sworn testimony showing that she did not

know or understand the information that should have been provided in the previous proceedings and, therefore, she did not knowingly, intelligently, and voluntarily waive her right to counsel.

The State erroneously claims that Ms. Clark did not point to any evidence showing that the circuit courts in the previous proceedings failed to give her the required information under *Klessig.* (State's Br., pg. 1). This disingenuous argument completely ignores the evidence.

As stated, Ms. Clark testified and averred that neither court personally addressed her or performed a colloquy with her concerning the difficulties and disadvantages of self-representation, the seriousness of the charges against her, and the general range of penalties that could have been imposed on her. She also indicated neither court performed colloquies with her to ensure she was making a deliberate choice to proceed without counsel. Ms. Clark further stated that neither court advised her of her right to a lawyer.

Ms. Clark, who lacks any legal training, averred she pled guilty just to get the cases over with, that she was scared, and that she was confused as to the rights she was waiving. She was also unaware that a lawyer could have assisted her in

various ways, such as objecting to the State's evidence, filing motions raising constitutional and evidentiary issues, and negotiating a more favorable plea bargain on her behalf.

The evidence is more than sufficient to establish a prima facie showing that Ms. Clark's right to counsel was violated in the previous proceedings. For example, the defendant in *Baker* averred he did not waive his right to counsel. *Baker,* 169 Wis. 2d at 76. The defendant in *Drexler* averred the court never informed him a lawyer could be appointed for him if he could not afford counsel. *Drexler,* 2003 WI App at ¶ 6. These assertions were sufficient to make a prima facie showing. *Baker,* 169 Wis. 2d at 77-78; *Drexler,* 2003 WI App at ¶ 10. Ms. Clark's evidence is similar, but more detailed and persuasive than the evidence submitted by the defendants in *Baker* and *Drexler.*

Based upon the foregoing, the circuit court did not err in finding that Ms. Clark made a prima facie showing that her right to counsel had been violated.

III. The State Failed to Prove by Clear and Convincing Evidence that Ms. Clark's Right to Counsel Waivers Were Knowing, Intelligent, and Voluntary

Because Ms. Clark made a prima facie showing that her right to counsel had been violated, the burden shifted to

the State to prove by clear and convincing evidence that Ms. Clark's right to counsel waivers were knowing, intelligent, and voluntary. *Ernst*, 2005 WI at ¶ 27. The State fell well short of meeting this burden.

The State does not contend it proved by clear and convincing evidence that Ms. Clark's waivers were valid. Instead, the State merely claims the burden of proof should not have shifted to the State. (State's Br., pg. 33). For reasons stated, Ms. Clark made a prima facie showing that her right to counsel had been violated. Therefore, the circuit court correctly shifted the burden to the State.

The State writes ". . . [it] provided evidence relating to Clark's 2002 conviction verifying that the circuit court performed its required duties. . ." (Id. at pg. 35). This statement could not be further from the truth.

The State introduced a minute sheet from the 2002 proceeding. This minute sheet contained a box that was checked. Next to the box reads, "Def. advised of his right to attorney/constitutional rights." (R. 39). According to the State, this one sentence proves by clear and convincing evidence that Ms. Clark validly waived her right to counsel

and that she understood all of the information that should have been provided to her under *Klessig.* The State is wrong.

The minute sheet does not prove much of anything. It is a conclusory document devoid of detail. The reliability of the minute sheet is also highly questionable. The minute sheet states, "Def. advised of ***his*** right to attorney/constitutional rights." (Id.) (emphasis and italics added). Ms. Clark is a woman. It is also unknown who drafted the minute sheet. The State did not call the author of the minute sheet as a witness nor did the State supply the circuit court with any information regarding the author's identity.

Ms. Clark disputed the minute sheet's assertion that she was advised of her right to counsel. (R. 67, pg. 40). However, even if the document proved by clear and convincing evidence that Ms. Clark was advised of her right to counsel, the minute sheet did not prove by clear and convincing evidence that the circuit court conducted a colloquy with Ms. Clark in compliance with *Klessig* and that she understood the information that was required to be given to her under *Klessig*.

The minute sheet provides no evidence, let alone clear and convincing evidence, that Ms. Clark made a deliberate

choice to proceed without counsel and that she was aware of the difficulties and disadvantages of self-representation, the seriousness of the charges against her, and the general range of penalties that could have been imposed on her. The minute sheet completely fails to address these *Klessig* requirements.

Finally, should the Court determine the minute sheet proves by clear and convincing evidence that Ms. Clark validly waived her right to counsel in the 2002 proceeding, that determination still does not affect Ms. Clark's motion collaterally attacking her 1995 conviction. The minute sheet from the 2002 proceeding has no bearing on Ms. Clark's 1995 conviction. The State presented virtually no evidence regarding Ms. Clark's 1995 conviction.

IV. Even if the Court Adopts the State's Proposed Rule Changing the Burden of Proof in Collateral Attacks, Ms. Clark Still Proved that Her Right to Counsel was Violated in the Previous Proceedings

Even if the Court adopts the State's proposed rule regarding the burden of proof in collateral attacks, Ms. Clark still proved she did not validly waive her right to counsel in the previous proceedings.

Ms. Clark provided the circuit court with clear and convincing evidence that her right to counsel was violated in

the previous proceedings. She submitted a detailed affidavit pointing to facts establishing she did not validly waive her right to counsel. Ms. Clark's testimony at the evidentiary hearing buttressed the evidence in her affidavit. The State failed to present any persuasive evidence refuting Ms. Clark's claim that she did not validly waive her right to counsel in the previous proceedings. Therefore, even if the Court determines that Ms. Clark should have retained the burden of persuasion, the record clearly demonstrates she met this burden.

The State claims the circuit court did not find Ms. Clark credible. (State's Br., pg. 35). This is not true. While the circuit court expressed some concern regarding Ms. Clark's credibility, it did not find that Ms. Clark was not credible. The circuit court's written order did not include a finding that Ms. Clark's testimony was not credible. Moreover, the circuit court could properly find Ms. Clark credible even if it did not accept all of Ms. Clark's testimony. *See O'Connell vs. Schrader,* 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988).

Critically, the circuit court accepted Ms. Clark's version of what happened during the previous proceedings. The State introduced the minute sheet in an apparent effort to

demonstrate that Ms. Clark was advised of her right to a lawyer in the 2002 proceeding. Ms. Clark denied that she was advised of her right to a lawyer in the previous proceedings. (R. 67, pg. 40). The circuit court asked Ms. Clark if she was "positive" that no one told her anything regarding the 2002 proceeding. (Id). She indicated she was "positive." (Id.)

In its oral ruling, the circuit court stated there was "nothing in the record to refute [Ms. Clark's affidavit and testimony]." (R. 68, pg. 12). Based upon this statement, and the fact that Ms. Clark's testimony/affidavit conflicted with the minute sheet's assertion that she was advised of her right to a lawyer, the circuit court reconciled this conflicting evidence in favor of Ms. Clark. Thus, it cannot be stated that the circuit court found Ms. Clark not credible. The State has failed to show this finding was in error. *See Plesko vs. Figgie Int'l,* 190 Wis. 2d 764, 775, 528 N.W.2d 446 (Ct. App. 1994) ("[w]hen the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of witnesses and the weight to be given to their testimony").

Simply put, the circuit court correctly assigned little, if any, weight to the minute sheet. The State has failed to prove the circuit court erred in this regard. *See State vs. Bokenyi,*

2014 WI 61, ¶ 37, 355 Wis. 2d 28, 848 N.W.2d 759 ("[a]n appellate court reviews the circuit court's findings of fact under the clearly erroneous standard of review").

V. Should the Court Change the Burden of Proof in Collateral Attacks, Ms. Clark Should be Afforded an Opportunity to Meet that New and Higher Burden at Another Evidentiary Hearing

For reasons stated, Ms. Clark opposes the State's request to change the burden of proof in collateral attack motions. But in the event the Court adopts the State's proposed rule, the Court should instruct the circuit court to hold another evidentiary hearing in order to allow Ms. Clark an opportunity to meet that new and higher burden.

It would be unfair and illogical to determine that Ms. Clark did not meet a burden of persuasion at the evidentiary hearing. At the time of the hearing, Ms. Clark was only required to make a prima facie showing that her right to counsel had been violated. Ms. Clark presented her case in a manner to meet that burden of production only. Ms. Clark certainly cannot be faulted for not meeting a burden of persuasion that did not exist at the time of the hearing.

If the Court changes the burden of proof in collateral attack motions and determines Ms. Clark must satisfy a

burden of persuasion, another evidentiary hearing is necessary to allow the circuit court to make factual findings and apply those findings to any new and higher burden of proof. *See State vs. Anker,* 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483 (holding that this Court is not a fact-finding court). Obviously, the circuit court did not and could not find whether Ms. Clark satisfied a burden of persuasion that did not exist at the time of the hearing.

CONCLUSION

Based upon the foregoing, Ms. Clark respectfully requests that this Court affirm the circuit court's order granting Ms. Clark's collateral attack motion.

Dated this 8th day of February, 2021.

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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 7,730 words.

Dated this 8th day of February, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, excluding the supplemental 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 8th day of February, 2021.

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