STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2021 AP 1826
Green County Circuit Court Cases 2021 CT 000010

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ERIC ALLAN ERICKSON,

Defendant-Respondent.

ON APPEAL FROM THE ORDER OF THE CIRCUIT COURT OF GREEN COUNTY, THE HONORABLE FAUN M. PHILIPSON, PRESIDING.

BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in finding the Defendant had established a prima facie showing that his sixth amendment right to counsel was violated in a prior OWI proceeding.

II. Whether the Circuit Court erred in finding the State failed to demonstrate the Defendant knowingly, intelligently, and voluntarily waived his right to counsel in this prior OWI proceeding, thereby granting the Defendant's motion to collaterally attack.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The Plaintiff-Appellant does not request oral argument. Oral argument is not necessary because "the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost." Wis. Stat. § 809.22(2)(b). Publication is not necessary.

STATEMENT OF THE CASE AND FACTS

On January 21, 2021, a criminal complaint was filed alleging the Defendant, on November 27, 2020, operated a motor vehicle while under the influence of an intoxicant as a third (3rd) offense and operated a motor vehicle with a prohibited alcohol concentration as a third (3rd) offense. *R. 4 at 1.* The complaint further asserted the Defendant had two valid prior convictions of operating while under the influence of an intoxicant – the first conviction was entered on September 09, 2002 for an incident which occurred on June 14, 2002, and the second conviction was entered on October 02, 2006 for an incident which occurred on April 01, 2006. *R. 4 at 2.*

On March 18, 2021, the Defendant-Respondent (hereinafter referred to as "Defendant") filed a "Notice of Motion and Motion to Collaterally Attack Prior Conviction" with a supporting affidavit. *R. 11 and 13.* Specifically, the Defendant's motion sought to collaterally attack the Defendant's second OWI conviction entered on October 02, 2006 for three reasons:

1. The waiver was not knowingly and intelligently made by the Defendant;
2. The Court failed to advise the Defendant of all the implications with respect to the

right to counsel, including the right to a Dean hearing; and

3. The Court failed to advise the Defendant of potential penalties of the offense, as well as the future enhancement penalties as a result of the conviction.

R. 11. The Defendant submitted an affidavit in support of this motion alleging as follows:

2. On October 2, 2006, I was convicted of a second offense operating while under the influence of an intoxicant in Green County Circuit Court Case NO. 2006-CT-47. I was not represented by an attorney in that proceeding.

3. To the best of my recollection, I was never advised by the Trial Court that I had a right to have an indigency determination by the Public Defender's Office reviewed and to have an attorney appointed by the County to represent me.

4. At the time I entered a plea on October 2, 2006, in Green County Case No. 2006-CT-47, I was employed at RBS Activewear in Argyle, Wisconsin earning $9.00 per hour. I did not have sufficient income and assets to pay for an attorney. I was

> unaware that I had a right to a *State v. Dean* hearing to have the court appoint an attorney for me.

R. 13 at 1. In addition, the Defendant filed a supporting brief wherein he argued the court failed to engage in a colloquy regarding a waiver of the Defendant's right to an attorney as required by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

On April 19, 2021, the State filed a "Motion to Summarily Deny Defendant's 'Motion to Collaterally Attack Prior Conviction' Without Evidentiary Hearing and Supporting Memorandum". *R. 17*. Within that motion, the State asserted the Defendant's March 18th motion and affidavit failed to conform to the standard set for in *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, insofar as the Defendant failed to establish a *prima facie* showing that his sixth amendment right to counsel was violated in 2006. *Id*.

On May 03, 2021, the Defendant filed a supplemental "Affidavit of Eric A. Erickson in Support of Motion to Collaterally Attack Prior Conviction". *R. 20*. Pursuant to that affidavit, the Defendant asserted as follows:

> 2. In 2006, I did not contact the State Public Defender's office as I knew my earnings

> would likely make me ineligible for a public defender. At the same time, I also knew that with my minimal earnings I could not afford to retain a private attorney. If I had been told by the Court or the Assistant District Attorney that I had the right to have any indigency determination reviewed by the Court and have the Court still appoint an attorney for me, I would have pursued that option to obtain counsel.

R. 20 at 1.

On May 17, 2021, the parties appeared before the Court for purposes of a motion hearing. *R. 48*. During that hearing, the Defendant asserted that he had established a *prima facie* case that his right to an attorney was violated by the court in 2006 because he was not informed of his right to court appointed counsel. *R. 48 at 10:4-25, 11:1-7.* In that same hearing, the State asserted that, pursuant to *State v. Drexler*, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182, the Court was not required to inform the Defendant of all of his avenues for counseling and, thus, the Defendant had not met his burden. *R. 48 at 11:8-25, 12:1-5.*

On May 27, 2021, in an oral ruling, the Circuit Court held the Defendant met his burden of demonstrating a *prima*

facie case "that he did not knowingly, intelligently and voluntarily waive his right to counsel." *R. 47 at 5:16-18*. The Court appears to have found this on the basis that no colloquy was conducted regarding the Defendant's waiver of right to an attorney at the time of plea and sentencing. *See R. 47 at 2:20-23*. The Court then found the burden shifted to the State to demonstrate by clear and convincing evidence that the Defendant did knowingly waive his right to counsel in 2006. *R. 47 at 4:25, 5:1-21*.

On August 24, 2021, an evidentiary hearing was held for purposes of determining whether the Defendant's knowingly, intelligently, and voluntarily waived his right to counsel in 2006. *R. 49*. (Please note, the transcript of this evidentiary hearing states the Honorable James R. Beer presided over this matter. This in incorrect. This hearing was held before the Honorable Faun M. Phillipson who took the bench on August 01, 2021 upon Judge Beer's retirement). During this evidentiary hearing, the Defendant testified that, in 2006, he was aware of his right to counsel insofar as he was aware that he could apply for representation with the State Public Defender's Office and that he could seek representation from a private attorney. *R. 49 at 10:1-3, 11:22-25, 12:1-3*. Further, the Defendant testified that he remembered very little about his initial appearance in 2006,

specifically, he could not recall the time of year, the time of day, the presiding judge, whether he was provided a copy of the 2006 criminal complaint, whether he made any court appearances besides his initial appearance and his plea and sentencing appearance, what information was told to him by the judge at the time of sentencing in 2006, or what kind of plea he entered. *R. 49 at 13-20*. Significantly, the Defendant testified that he remembered the Court advising him on his right to an attorney at the time of his initial appearance, specifically the "Right to have appointed a public defender." *R. 49 at 15:10-15*. The Defendant was unable to recall, until reminded, that he had, prior to his 2006 conviction, been twice represented by an attorney, once in 2005 for a divorce proceeding and once in 2001 for a criminal matter. *R. 49 at 20:3-25*. Most importantly, the Defendant testified that in 2006, he was aware of his right to an attorney, that he chose not to pursue either representation from a private attorney, or the State Public Defender's Office, and that he was aware that an attorney would have specialized knowledge that he may not have. *See R. 49 at 24:12-20*, 25:1-25, 26:1-18.

During this same evidentiary hearing, the State introduced evidence that the Defendant was informed at the time of his initial appearance of his right to an attorney

and that he was referred to the State Public Defender's Office. *R. 49 at 68:2-13*. Moreover, Attorney Taylor, an Assistant State Public Defender in 2006 testified that he informed all defendants at initial appearances to go downstairs and apply for Public Defender representation after their initial appearance. *R. 49 at 60:12-24*. Additionally, he testified that when defendants are found ineligible for public defender representation, they are informed they may choose to apply for court appointed counsel. *R. 49 at 62:22-25*.

Ultimately, on August 27, 2021, the Court held that the State failed to establish that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel in 2006. *R. 43*.

STANDARD OF REVIEW

Whether a defendant waived his right to counsel knowingly, intelligently and voluntarily is a question of law reviewed *de novo*. *State v. Ernst*, 2005 WI 107, ¶ 10. Whether a defendant has satisfied the burden of demonstrating this waiver with a *prima facie* showing of an invalid waiver is also a question of law which is reviewed *de novo*. *Id.*

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THE DEFENDANT HAD ESTABLISHED A PRIMA FACIE SHOWING THAT HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED IN A 2006 OWI PROCEEDING.

In the case at hand, the Defendant's alleges he met his *prima facie* showing that he did not knowingly waive his right to counsel because he claims to have been unaware of the right to court appointed counsel in 2006 and that the circuit court did not conduct a colloquy at the 2006 plea and sentencing hearing into his waiver of the right to counsel. In both respects, the Defendant is incorrect. A circuit court is not required to advise a defendant of the various ways in which he or she may seek an attorney, nor does a circuit court err if it does not provide a defendant with information as to his or her option for court appointed counsel. *See State v. Drexler*, 2003 WI 169, ¶ 17. Moreover, "…a defendant must do more than allege that 'the plea colloquy was defective' or the 'court failed to conform to its mandatory duties during the plea colloquy' to satisfy the standard for collateral attacks set forth in *Hahn*." *Ernst*, 2005 WI 107, ¶ 25.

Regarding the Defendant's assertion that the circuit court was required to inform him of his right to court

appointed counsel, and because, according to his recollection it did not, he could not have knowingly, intelligently, and voluntarily waived his right to an attorney in 2006 (see *R. 48 at 10*) – this issue was directly addressed by the Wisconsin Court of Appeals in *State v. Drexler*, 2003 WI App 169, 266 Wis. 2d 438, 669 N.W.2d 182. In *Drexler*, the defendant argued that he could not have knowingly, intelligently, and voluntarily waived his right to counsel because he was unaware of the right to court appointed counsel. *Id.* at ¶ 15. The court in *Drexler* held:

> *This court's research has not revealed any requirement that a trial court specifically advise a defendant that he or she is entitled to counsel appointed by the court and paid for by the county if he or she does not qualify for counsel provided by the public defender. In fact, all that is required is that courts advise the defendant that, if indigent, he or she has the right to appointed counsel.*

Id. at ¶ 13. The holding of the court in *Drexler* is unambiguous – a trial court is not required to inform a defendant of all manners in which they may be represented by counsel; rather, it is sufficient to simply notify a

defendant of his or her right to counsel. *Id.* at ¶ 17. More significantly, simply because a defendant's lack of knowledge as to one source for representation, despite knowing about other sources for representation, does not establish a *prima facie* showing that a defendant failed to waive his or her right to counsel knowingly, intelligently, and voluntarily. *See Id.* at ¶ 16. Therefore, in the case at hand, the Defendant errs in claiming he met his *prima facie* showing because he could not have knowingly waived his right to counsel because he was unaware only of his right to court appointed counsel, especially when he unequivocally testified he was aware of his right to a public defender and private attorney. As such, the circuit court's finding that the Defendant did meet his burden should be reversed and remanded.

Regarding the Defendant's second claim that he did not knowingly and intelligently waive his right to counsel because the circuit court in 2006 failed to engage in a *Klessig* colloquy regarding his waiver of counsel, this too must be reversed. *Ernst* is clear insofar as the requirement for a waiver of counsel colloquy is not constitutionally mandated. *Ernst*, 2005 WI 107, ¶¶ 19-21. Rather, this requirement was promulgated by the Wisconsin Supreme Court in *State v. Klessig* pursuant to the Court's

superintending and administrative authority. *Id.* In reaching this conclusion, the *Ernst* Court relied on *Iowa v. Tovar*, 541 U.S. 77, 124 S. Ct. 1379, 158 L.Ed.2d 209 (2004). *Tovar* held that "[t]he constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* at 81.

The Wisconsin Supreme Court has held that "…a Defendant must do more than allege that 'the plea colloquy was defective' or the 'court failed to conform to its mandatory duties during the plea colloquy' to satisfy the standard for collateral attacks set forth in *Hahn*." *Ernst*, 2005 WI 107, ¶ 25. The *Ernst* Court held that, to establish a *prima facie* case, a defendant must "…point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." *Id.* (internal citations omitted). Moreover, the *Ernst* Court held, "Any claim of a violation on a collateral attack that does not detail such facts will fail." *Id.* In the instant case, the Defendant

demonstrably failed to allege such facts. In fact, on the contrary, the Defendant testified that he was acutely aware of his right to counsel and chose not to pursue these rights. Moreover, his testimony on August 24, 2021 demonstrates that his assertions that he was unaware of the general range of penalties, the underlying charges, and his right to be counseled were inaccurate.

In support of his original motion to collaterally attack his 2006 conviction for a second offense OWI, the Defendant submitted an affidavit alleging the following facts:

> 2. On October 2, 2006, I was convicted of a second offense operating while under the influence of an intoxicant in Green County Circuit Court Case NO. 2006-CT-47. I was not represented by an attorney in that proceeding.
>
> 3. To the best of my recollection, I was never advised by the Trial Court that I had a right to have an indigency determination by the Public Defender's Office reviewed and to have an attorney appointed by the County to represent me.
>
> 4. At the time I entered a plea on October 2, 2006, in Green County Case No. 2006-CT-47, I was

> employed at RBS Activewear in Argyle, Wisconsin earning $9.00 per hour. I did not have sufficient income and assets to pay for an attorney. I was unaware that I had a right to a *State v. Dean* hearing to have the court appoint an attorney for me.

R. 13 at 1. In addition, the Defendant filed a supporting brief wherein he argued the court failed to engage in a colloquy regarding a waiver of the Defendant's right to an attorney as required by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). The Defendant then filed a supplemental affidavit on May 03, 2021 alleging the following facts:

> 2. In 2006, I did not contact the State Public Defender's office as I knew my earnings would likely make me ineligible for a public defender. At the same time, I also knew that with my minimal earnings I could not afford to retain a private attorney. If I had been told by the Court or the Assistant District Attorney that I had the right to have any indigency determination reviewed by the Court and have the Court still appoint

> an attorney for me, I would have pursued that option to obtain counsel.

R. 20 at 1.

These statements are insufficient to demonstrate that the Defendant did not know or understand his right to counsel. The Defendant makes conclusory statements that the circuit court failed to engage in the necessary colloquy regarding his waiver of right to an attorney at the time of sentencing and failed to inform him of the right to court appointed counsel. Due to these "errors" by the circuit court, the Defendant alleges that he was not fully aware of his right to counsel and, thus, could not have knowingly, intelligently, and voluntarily waived his right to counsel. Ultimately, based upon the information available to it at the time of May 27, 2021, and based upon current case law, the circuit court should have found the Defendant failed to establish a *prima facie* showing that he did not knowingly, intelligently, or voluntarily waive his right to counsel in his 2006 OWI proceeding. As such, this Court should reverse and remand this finding.

II. THE STATE DEMONSTRATED WITH CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL IN HIS

PRIOR OWI PROCEEDING, THEREBY GRANTING THE DEFENDANT'S MOTION TO COLLATERALLY ATTACK.

The United States Supreme Court has held that a waiver of counsel is constitutional "when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Tovar*, 124 S. Ct. at 1383. This ruling by the United States Supreme Court effectively overrules the Wisconsin Supreme Court's holding in *Klessig* in respect to the requirement that courts must inform defendants of the difficulties and disadvantages of self-representation. *Compare Tovar*, 124 S. Ct. at 1383, *with Klessig*, 211 Wis. 2d at ¶ 14. Specifically, the Court in *Tovar* held that circuit courts are not required to advise defendant that by waiving counsel, he or she may risk that a viable defense be overlooked. *Tovar*, 124 S. Ct. at 1383. What is required is that a circuit court inform defendants of the nature of the charge, the general range of penalties, and information regarding the right to counsel. *Id.* In the instant case, the record demonstrates this information was provided to the Defendant. Moreover, the record from the August 24, 2021 evidentiary hearing demonstrates the State met its burden in proving by clear and convincing evidence that

the Defendant knowingly, intelligently, and voluntarily waived his right to counsel in 2006.

The Defendant testified on August 24, 2021 that, in 2006, he was advised of his right to seek public defender representation, that he was aware he could seek representation with the public defender's office, that he could seek representation with a private attorney, that he understood an attorney may have more knowledge than him, and that he specifically chose not to pursue his known routes for counsel in 2006. *R. 49 at 10:1-3, 11:22-25, 12:1-3, 24:12-20, 25:1-25, 26:1-18.* The Defendant's affidavits and his testimony on August 24, 2021, demonstrate that he does not remember what occurred 15 years ago. In fact, the Defendant testified that he remembered very little about his initial appearance on May 15, 2006. *R. 49 at 13:24-25, 14:1.* The Defendant doesn't remember receiving a copy of his complaint. *R. 49 at 14:16-19, 48:14-18.* He does not recall the circuit court advising him of the maximum and minimum penalties at the time of his initial appearance, or reviewing the underlying charges with him. *R. 49 at 16:12-14.* He does not recall the circuit court advising him of enhanced penalties for future OWI violations. *R. 49 at 48:19-25.* The Defendant's

lack of memory is insufficient to demonstrate that he did know of or understand his right to counsel back in 2006.

The Wisconsin Court of Appeals has held that a defendant cannot meet a prima facie showing that his right to counsel was violated because he is unable to remember what a court told him at a prior hearing. *See State v. Hammill*, 2006 WI App 128, 11, 293 Wis. 2d 654, 718 N.W.2d 747. While the Defendant attempted to assert that he never received a copy of the 2006 criminal complaint, that he was unaware of the general range of penalties, that he was unaware of how an attorney could assist him, and that he did not recall the court advising him of the potential for enhanced penalties for future OWI convictions, the "Minutes from the Initial Appearance" (*R. 33*) and the transcript from the October 02, 2006 Plea and Sentencing hearing demonstrate that the Defendant's memory is simply incorrect. The "Minutes from the Initial Appearance" demonstrate the Defendant was provided a copy of the 2006 criminal complaint, that he was advised of the general range of penalties, that he was advised of his right to counsel, and that he was referred to the public defender's office. *R. 33*. Additionally, the transcript of the 2006 plea and sentencing demonstrates the defendant was advised by the Court that penalties for future OWI convictions

would increase and get worse. *R. 35 at 10:18-22*. The Defendant's lack of memory does not make these facts less true. In fact, the Defendant acknowledged that his memory was incorrect when, after having his memory refreshed with a copy of the transcript from the 2006 plea and sentencing hearing (*R. 35*), he acknowledged that he did recall the circuit court advising him of harsher consequences for future OWI convictions. *R. 49 at 18:8-25, 19:1-24*. Undoubtedly, what appears to be true is the Defendant's memory does not match the record of his 2006 OWI proceeding.

The Defendant's inaccurate memory is further demonstrated by the testimony of Attorney Guy Taylor and Melanie Leutenegger, a clerk with the Green County Clerk of Courts Office. On August 24, 2021, the State presented evidence of the Defendant's further awareness of his right to counsel in the form of testimony from Attorney Taylor, an Assistant State Public Defender of 34 years. *R. 49 at 60:1-24*. Attorney Taylor testified that he appeared with all unrepresented defendants at initial appearances in Green County in 2006, whether they were summonsed in or in custody. *R. 49 at 59:23-25, 60:1-11*. Attorney Taylor further testified that when appearing with defendants at initial appearances, he would always inform them to contact

the Public Defender's Office if they wanted to seek representation from his office. *R. 49 at 60:12-24*. Furthermore, Attorney Taylor testified that defendants are informed of their right to apply for court appointed counsel if they are found ineligible for public defender representation. *R. 49 at 62:22-25*.

In addition to Attorney Taylor, the State produced evidence of the Defendant being advised of the nature of the underlying charges, the general range of penalties, and of his right to an attorney, in the form of minutes from his May 15, 2006 initial appearance and testimony from Melanie Leutenegger (hereinafter referred to as "Mel"). Mel is a clerk with the Green County Clerk of Court's office where she has been employed for 20 years. *R. 49 at 65:21-25, 66:1*. Mel testified that she regularly completes minutes for court hearings she clerked, estimating she's filled out thousands of these minutes, and that she marked boxes and took notes as things occurred during the hearing. *R. 49 at 66:11-13, 68:5-17*. A review of the minutes from the May 15, 2006 hearing demonstrate the circuit court reviewed the Defendant's charges with him, advised him of the general range of penalties available, advised him of his right to counsel and referred him to the Public Defender's Office. *R. 33*. Despite the Defendant's claims

to the contrary, the record speaks for itself and the record is unambiguous – the Defendant was advised of his right to counsel, he was advised of the nature of the underlying charges, and he was advised of the general range of penalties for his charges (in accordance with the holdings of *Tovar*).

Ultimately, what the record demonstrates is that the Defendant, in 2006, was aware of his right to counsel, was aware of the nature of the charges he was facing, and was aware of the general range of penalties and made a deliberate choice not to pursue an attorney. In the case at hand, based upon the evidence presented on August 24, 2021, the State demonstrated by clear and convincing evidence that the Defendant made a knowing, intelligent, and voluntary waiver of his right to counsel in his 2006 OWI proceeding. Despite the Defendant's assertions to the contrary, the trial court was not required to inform him of every avenue available to him for the appointment of an attorney, just that he had the right to one. Further, the Defendant's own lack of memory, when looked at with respect to the record available in the 2006 proceeding, is insufficient to demonstrate that he did not know or understand his right to an attorney. Based upon the above, this Court should reverse and remand on the basis that the

circuit court erred in finding the Defendant had made a *prima facie* showing that he did not knowingly, intelligently, and voluntarily waive his right to counsel.

CONCLUSION

There are two questions before the Court: (1) Did the circuit court err when it found the Defendant had met his initial burden of making a *prima facie* showing that he did not knowingly, intelligently, or voluntarily waive his right to counsel in his 2006 OWI proceeding? and (2) Did the circuit court err when it found the State failed to establish by clear and convincing evidence that the Defendant had knowingly, intelligently, and voluntarily waived his right to counsel in 2006, thereby granting the Defendant's motion to collaterally attack his 2006, second offense OWI conviction? The answer to both questions is simple – yes.

Regarding the first question, *Ernst*, *Tovar*, and *Drexler* are the guiding foundations for this Court's consideration. *Drexler* directly forecloses the Defendant's assertion that he could not have possibly made a voluntary, knowing, and intelligent waiver of his right to counsel simply because he was unaware of his right to court appointed counsel, despite being acutely aware of his other possible avenues for representation. *Tovar* provides the guiding principle that, constitutionally, it is only required that a court advise a defendant of the nature of the underlying charges, the right to counsel, and the general range of penalties for the charges alleged. In the instant case, in spite of the Defendant's

faulty memory, the record demonstrates that this very information mandated by *Tovar* was provided to the Defendant in his 2006 OWI proceeding. Finally, *Ernst* mandates that a defendant must do than allege a faulty colloquy by a court regarding a defendant's waiver of right to an attorney. In the instant case, the Defendant points to no other facts which demonstrate he was not aware of the information he should have been provided, such that his right to counsel was violated. For these reasons, the circuit court erred in finding the Defendant met his initial burden in his collateral attack motion.

In respect to the second question, the record demonstrates that on August 24, 2021 in an evidentiary hearing, the State demonstrated by clear and convincing evidence that the Defendant knowingly, intelligently, and voluntarily waived his right to counsel in 2006. The State introduced the following evidence: (1) the 2006 criminal complaint demonstrating the Defendant was notified of the charges he faced, the nature of the charges, and the range of penalties for each charge; (2) minutes from the May 15, 2006 initial appearance demonstrating the Defendant was provided a copy of the criminal complaint, advised of the nature of his charges, advised of the general range of penalties for each charge, advised of his right to counsel, and referred to

the Public Defender's Office; (3) testimony from Assistant State Public Defender Guy Taylor and clerk Melanie Leutenegger demonstrating the veracity of the circuit courts information provided to the Defendant on May 15, 2006; and (4) testimony from the Defendant demonstrating that he was aware of his right to counsel in 2006, aware of different sources of representation available to him, deliberately chose not to pursue his known possibilities for representation in 2006, and demonstrating that he simply couldn't remember most of what occurred during his 2006 OWI proceeding at various stages. When viewed in totality, the State undeniably demonstrated the Defendant made a knowing, intelligent, and voluntary waiver of his right to counsel in 2006. For these reasons, the circuit court erred in finding the State failed to meet its burden on August 24, 2021.

Based upon the above, this Court should reverse and remand the circuit court's rulings on May 27, 2021 and August 27, 2021.

CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 31 pages.

Dated this 25th day of January, 2022.

Signed,

Corinne L. Frutiger

_____
Electronically signed by:
Attorney Corinne L. Frutiger
State Bar Number 1113703

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12), Wis. Stats. I further certify that this brief conforms to the rules contained in §§ 809.19(12)(f) and 809.19(13)(f), Wis. Stats. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties by electronic filing.

Dated this 25th day of January, 2022.

Signed,

Corinne L. Frutiger

_____
Electronically signed by:
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