STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appellate Case No. 2024AP2306-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

MATTHEW JOHN FLYNN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR OZAUKEE COUNTY, BRANCH I, THE HONORABLE STEVEN M. CAIN PRESIDING, TRIAL COURT CASE NO. 23-CT-305

BRIEF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Wisconsin Statutes

United States Supreme Court Cases

Wisconsin Supreme Court Cases

Other Authority

STATEMENT OF THE ISSUE

WHETHER MR. FLYNN ESTABLISHED A *PRIMA FACIE* CASE PURSUANT TO *STATE v. KLESSIG*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), SUCH THAT HE WAS ENTITLED TO A HEARING ON HIS MOTION COLLATERALLY ATTACKING HIS 2011 SHEBOYGAN COUNTY CONVICTION FOR OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICANT?

> Trial Court Answered: NO. The circuit court concluded that there was a "presumption of regularity" inherent in court procedures, and therefore, despite Mr. Flynn's affidavit and presentation of a defective Plea Questionnaire and Waiver of Right to Attorney forms from his prior offense, there was "simply no way for Mr. Flynn to demonstrate otherwise." R58 at 3:18 to 4:11; D-App. at 104-05.

STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant will NOT REQUEST oral argument as this appeal principally presents a question of law based upon a set of uncontroverted facts. The issue presented is of a nature that can be addressed by the application of long-standing legal principles, the type of which would not be enhanced by oral argument.

STATEMENT ON PUBLICATION

Mr. Flynn will NOT REQUEST publication of this Court's decision as the common law authority at issue is well developed and would neither be enhanced nor clarified by publication of this Court's decision.

STATEMENT OF THE CASE

By criminal complaint filed on August 16, 2023, Mr. Flynn was charged in Ozaukee County with Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, contrary to Wis. Stat. § 346.63(1)(a). R3. Later, by amended complaint filed on September 22, 2023, Mr. Flynn was additionally charged with Operating a Motor Vehicle With a Prohibited Alcohol Concentration—Third Offense, contrary to Wis. Stat. § 346.63(1)(b). R15.

After retaining counsel, Mr. Flynn filed several pre-trial motions including, *inter alia*, a motion collaterally attacking his prior 2011 Sheboygan County conviction for operating a motor vehicle while intoxicated under *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997). R21. This motion was initially denied

by the circuit court, the Honorable Paul v. Malloy. R58 at 3:1-24; R28 at p.14; D-App. at 105.

Subsequently, Mr. Flynn filed an amended collateral attack motion which included an affidavit in support thereof and defective Plea Questionnaire and Waiver of Right to Attorney forms from his 2011 Sheboygan County conviction. R35 & R36; D-App. at 128-33.

A decision hearing on Mr. Flynn's amended motion was held on November 5, 2024, before the Honorable Steven M. Cain. R58. Judge Cain denied Mr. Flynn's amended collateral attack motion, finding that the "presumption of regularity" inherent in court procedures precluded Mr. Flynn from demonstrating that his 2011 colloquy was defective, despite his affidavit and other documentation. R58 at 3:18 to 4:11; D-App. at 104-05.

After the adverse decision was issued by the circuit court, Mr. Flynn entered a plea of guilty on the same day to the charge of Operating a Motor Vehicle While Under the Influence of an Intoxicant—Third Offense, whereupon the lower court entered a judgment of conviction against him. R43; D-App. at 101-02.

It is from the adverse decision and judgment of the circuit court that Mr. Flynn now appeals to this Court by Notice of Appeal filed on November 11, 2024. R6.

STATEMENT OF FACTS

On August 12, 2023, Mr. Flynn was detained in the Village of Saukville, Ozaukee County, by Officer Christopher Janich of the Saukville Police Department, for allegedly operating his motor vehicle in excess of the posted speed limit. R15 at p.2.

After making contact with Mr. Flynn, Officer Janich observed that he had glassy eyes and would turn his head away from him when speaking. R15 at p.2. According to the officer, Mr. Flynn became uncooperative and had to be coaxed to step out of his vehicle. R15 at p.2. After alighting from his vehicle, Mr. Flynn consented to perform a battery of standardized field sobriety tests, exhibiting sufficient indicia of impairment such that he was taken into formal custody for operating while intoxicated. R15 at p.2.

Mr. Flynn was thereafter asked to submit to a blood test, to which request he consented. R15 at p.2. Two vials of Mr. Flynn's blood were obtained, and a

subsequent analysis of his blood specimen yielded an ethanol result above the prohibited limit, whereupon he was additionally charged with operating a motor vehicle with a prohibited alcohol concentration. R15 at pp. 2-3.

STANDARD OF REVIEW

This appeal presents an issue of whether the court below erroneously denied Mr. Flynn his right to a hearing collaterally attacking his prior conviction for operating while intoxicated. Such questions are examined under "a mixed standard of review" which requires this Court to first examine *de novo* whether the defendant's motion "alleges sufficient material facts," and if not, whether the circuit court erroneously exercised its discretion in denying a hearing. *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433.

ARGUMENT

I. MR. FLYNN WAS UNLAWFULLY DENIED HIS RIGHT TO A HEARING COLLATERALLY ATTACKING HIS 2011 SHEBOYGAN COUNTY CONVICTION FOR OPERATING A MOTOR VEHICLE WHILE INTOXICATED IN VIOLATION OF *STATE v. KLESSIG*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

A. Statement of the Law Relating to Collateral Attacks on Prior Convictions.

In *State v. Clark*, 2022 WI 21, 401 Wis. 2d 344, 972 N.W.2d 533, the Wisconsin Supreme Court held that a defendant who collaterally attacks a prior conviction for operating while intoxicated under *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), "retains the burden to prove a violation of [the] right to counsel" in the absence of a transcript of a plea colloquy from the prior offense. *Clark*, 2022 WI 21, ¶¶ 20-21. In reaching this holding, the *Clark* court extensively examined the interplay between its prior holdings in *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). *Clark*, 2022 WI 21, ¶¶ 13-18. The *Clark* court concluded that, in light of the "presumption of regularity" inherent in final judgments, the *Bentley* standard which keeps the burden with the defendant to prove an irregularity is "'the more appropriate review . . . .'" *Clark*, 2022 WI 21, ¶¶ 13, 15 (footnote omitted), quoting *State v. Negrete*, 2012 WI 92, ¶ 33, 343 Wis. 2d 1, 819 N.W.2d 749.

The *Clark* court further clarified:

> Where the transcript of the plea hearing is unavailable, however, *Bangert's* burden shifting procedure does not apply, because: (1) the defendant will not be able to make the requisite showing from the transcript that the circuit court erred in the plea colloquy, and (2) 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.

Clark, 2022 WI 21, ¶ 15, quoting *Negrete*, 2012 WI 92, ¶ 31.

A superficial examination of *Clark* might lead to the erroneous conclusion that the entire burden rests with the defendant to establish a violation of *Klessig* whenever a transcript of the plea colloquy in the prior offense has not been preserved. At first blush, this seems a tenable position because the *Clark* court stated:

> To recap, if a defendant collaterally attacking a prior OWI/PAC conviction cannot point to a defect in the relevant transcript, the burden-shifting procedure does not apply. Instead, the defendant must carry the burden to demonstrate that a violation occurred.

Clark, 2022 WI 21, ¶ 20. Based upon the foregoing quote, it appears that the door has forever been shut on the ability of any defendant to ever again shift the burden to the State to demonstrate that a colloquy was compliant with the Sixth Amendment. Both logic and a more careful examination of *Clark*, however, dictate otherwise.

Assume, *arguendo*, that a defendant orders the record from a prior conviction, and while he is informed that no transcript exists, other portions of the **record** are defective, including the Clerk's Minutes, a Plea Questionnaire, and a Waiver of Right to Attorney form. One could conclude from the defects in these records that the accused did not have an adequate understanding of either the penalties to which he was exposed or of the extent of his right to counsel.

Despite this documentary evidence from the *record* in the prior matter, if one adopts the rigid and mechanistic approach suggested by the *Clark* court, an absurdity would result. That is, even though there is a multitude of paperwork from the **record** which indicates that the defendant did not understand his rights, he

would still bear the burden of having to prove the "negative"—that the colloquy was deficient—rather than the burden shifting to the State to prove the affirmative, *i.e.*, that it comported with the Sixth Amendment. This outcome makes no sense given that the *Clark* decision **never** overruled or abrogated *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92,[1] which provided that:

> [T]he defendant must make a prima facie showing that his or her constitutional right to counsel in a prior proceeding was violated. In order to avoid any question concerning a valid waiver, "**the record** must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L. Ed. 2d 70, 82 S. Ct. 884 (1962). For there to be a valid collateral attack, **we require the defendant to 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. *See Hampton*, 2004 WI 107, 274 Wis. 2d 379 ¶ 46, 683 N.W.2d 14 (citing *Bangert*, 131 Wis. 2d at 274-75). Any claim of a violation on a collateral attack that does not detail such facts will fail.

Ernst, 2005 WI 107, ¶ 25 (emphasis added). Clearly under *Ernst*, if a defendant can "point to facts" in the "record" which establish a *prima facie* case, then the burden should be shifted back to the State as the decision in *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), requires.

Based upon the foregoing, the question now becomes: How can *Ernst* and *Clark* be resolved to preserve the integrity of both? They can both be preserved if one recognizes that the *Clark* holding is limited to the facts before the court at the time the decision was issued and that the *Clark* court elected *not* to overrule, abrogate, or otherwise rescind the *Ernst* holding described above. More specifically, the *Clark* court very deliberately observed that the *Ernst* decision was premised upon circumstances in which a transcript was available, but also noted that "[w]e did not discuss what our analysis would look like if no transcript of the prior proceeding was available." *Clark*, 2022 WI 21, ¶ 17. The *Clark* court could easily have made a different statement with respect to *Ernst* than simply refusing to state what "its analysis would look like" in the absence of a transcript. It could have stated, "We now qualify our decision in *Ernst* to . . . ," or "We now overrule *Ernst*,"

[1]In fact, it should be noted that the *Clark* court **favorably** relied on *Ernst* throughout its decision. *Clark*, 2022 WI 21, ¶ 10-12, 17-19.

or "We now modify *Ernst* to the extent that . . . ." Yet, the *Clark* court did none of these things. Instead, it left the door open to decide in the future whether the *Ernst* court's broader approach of a defendant simply "pointing to facts" in the "record" should be more stringently limited to *only* those circumstances in which a *transcript* is available or whether *additional indicia* from the prior record could establish a *prima facie* case for the defendant.

The limitation of the issue to the facts before the *Clark* makes perfect sense when one not only considers that the language in *Ernst* was never modified, but also that the *Clark* court adopted the broad *Ernst* language from the outset when it opined:

> This court has created a procedure to facilitate these challenges. First, **by pointing to evidence in the record**, a defendant must establish a prima facie case that the defendant did not knowingly, intelligently, and voluntarily waive the right to counsel. Once established, the burden shifts to the State to prove that the waiver was nonetheless valid.

Clark, 2022 WI 21, ¶ 1 (emphasis added). After restating these procedures, the *Clark* court then framed the question before it thusly:

> The question presented here is whether **this same burden-shifting procedure should apply when the relevant hearing transcript from the prior conviction is unavailable**. We conclude it should not, and hold that **in these circumstances**, the defendant retains the burden to demonstrate the right to counsel was violated.

Id. ¶ 2 (emphasis added). From the outset, the *Clark* court limited the "reversal" of the burden shifting procedure to ***those*** circumstances in which "the relevant hearing transcript from the prior conviction is unavailable." Note that the *Clark* court ***never*** stated, observed, determined, admonished, or otherwise held that ***other*** portions of the record could not satisfy the *Ernst* rule which requires the burden to shift back to the State after the defendant makes a *prima facie* showing.

As a further point of refinement, when the *Clark* court described Ms. Clark's underlying argument, it observed that her motion was granted "despite the absence of the relevant transcript," but the court did *not* note that Ms. Clark submitted *other* portions of the "record" to support her claim, rather her claim rested wholly and solely on the absence of a transcript and her affidavit as the justification for the resolution she sought. *Id*. ¶ 3. It is telling to recognize that in an effort to rebuff

one of Ms. Clark's multiple collateral attacks, the State submitted to the circuit court for its consideration a criminal complaint, a bond sheet, a plea hearing minutes sheet, and a sentencing hearing minutes sheet which ostensibly undermined Ms. Clark's allegation of a defective plea colloquy in her prior offense. *Id*. ¶ 6. **At this juncture, the *Clark* court did *not* comment that those portions of the record upon which the State relied were in any way inconsequential, irrelevant, or outside the scope of the transcript and therefore could not be considered**. *Id*. Thus, Mr. Flynn asserts that what is "sauce for the goose is sauce for the gander," and therefore, the *Clark* decision cannot be viewed as barring the use of portions of a record apart from the transcript in order to establish the *prima facie* burden under either *Ernst* or *Klessig*, both of which remain good law.

While a cursory reading of *Clark* leads to a conclusory supposition that a transcript is the "end all, be all" when it comes to the accused levying a *prima facie* case under *Ernst*, one must inquire whether the *Bangert* burden shifting would apply if, instead of there not being a violation when it "is not evident from the transcript," there exists a "situation[] where a violation ***is*** . . . evident from" *other* absent portions of the record? Logic should dictate that the answer to this question is "yes," and it appears that the *Negrete* court—**the very decision the *Clark* court quoted**—came to a similar conclusion when, at the end of its analysis of the applicability of the *Bentley* standard to circumstances in which there is no transcript, noted that "[a]llegations which are 'less susceptible to **objective confirmation in the record**' are particularly suited to a *Bentley*-type analysis, ..." *Negrete*, 2012 WI 92, ¶ 31 (emphasis added). For the reasons set forth below, Mr. Flynn posits that his allegations ***are*** "susceptible to objective confirmation in the record" given the exhibits he annexed to his amended motion. If his allegations are objectively confirmable, then following the *Negrete* logic, they would ***not*** be "particularly suited to a *Bentley*-type analysis," and the *Bangert* standard should apply.

The foregoing analysis rings especially true given the *Clark* court's reliance on a decision of the United States Supreme Court in *Parke v. Raley*, 506 U.S. 20 (1992). More specifically, the *Clark* court believed that the defendant's assertion that the burden should shift to the State "anytime a defendant makes a *prima facie* showing of a constitutional violation in a prior proceeding, even without a transcript" was too broad. *Clark*, 2022 WI 22, ¶ 19. In rejecting this argument, the *Clark* court relied on *Parke*. *Id*. Again, however, a close examination of the *Parke* decision yields to Mr. Flynn's point about ***other objective*** portions of the record

satisfying the *prima facie* burden of establishing a *Klessig* violation. For example, when the *Parke* Court reached its conclusion regarding the "presumption of regularity," it did so only *after* observing that "[e]vidently, no transcripts **or other records** of the earlier plea colloquies exist at all." *Parke*, 506 U.S. at 30 (emphasis added). Unlike *Parke*, other objective records exist in the instant matter which ***do call into question*** whether Mr. Flynn's plea was constitutionally taken exist in the form of the incomplete information on both the Plea Questionnaire and Waiver of Right to Attorney forms executed in his 2011 Sheboygan County case.

To correctly apply the *Clark* rule, one must understand that the *Clark* court was faced with the question of whether it was unfair to "**automatically** shift[] the burden to the State in the absence of a transcript . . . ." *Clark*, 2022 WI 21, ¶ 18 (emphasis added). Mr. Flynn did *not* ask the lower court to "automatically" shift the burden to the State simply because there was no transcript. Instead, Mr. Flynn proffered that because he can "point to facts" in the "record" of his prior case (*see Ernst*, 2005 WI 107, ¶ 25, *et al.*), he satisfied the *prima facie* burden to prove that his Sixth Amendment rights were violated *with objective evidence* such that the burden shifting procedures described in *Ernst* and *Klessig* apply. Since any burden shifting would not have been the result of an "automatic shift" premised solely upon the absence of a transcript, the *Clark* rule should not have come into play in Mr. Flynn's case. It is really a question of "which came first, the chicken or the egg," or put in alternative terms, "does the *Ernst/Klessig* rule act as a gatekeeper to *Clark* or does *Clark* act as a gatekeeper to *Ernst/Klessig*?"

Mr. Flynn posits that the answer to the foregoing question is the former, not the latter. That is, one must first assess whether the accused has made a *prima facie* showing of a *Klessig* violation by "pointing to facts" in the "record" (*see Ernst*, 2005 WI 107, ¶ 25, *et al.*). If the accused cannot "point to facts" in the "record," *and* there is no transcript, *then Clark* stands for the proposition that the burden remains wholly on the defendant's shoulders.

If the gatekeeper was *Clark* rather than *Ernst/Klessig*, absurd results would be worked. This approach suggests that the burden would remain entirely on the defendant's shoulders even in cases where other *objective* portions of the record—such as an incomplete Plea Questionnaires and Waiver of Right to Attorney forms, *etc*.—exist which made a *prima facie* showing that the defendant did not fully appreciate or understand his or her constitutional rights. Logic seems to dictate,

therefore, that an *Ernst/Klessig* approach precedes the imposition of *Clark* burden-retention rather than it being the other way around.

In summary, one of the things which every first-year law student learns—on practically the first day of law school—is that the holding of a case is generally limited to the facts before it. *See, e.g.*, *Daanen & Janssen v. Cedarapids, Inc.*, 216 Wis. 2d 395, 415, 573 N.W.2d 842 (1998); *Lane v. Sharp Packaging Sys.*, 2002 WI 28, ¶¶ 39, 41, 251 Wis. 2d 68, 640 N.W.2d 788; *Koffman v. Leichtfuss*, 2001 WI 111, ¶ 39, 246 Wis. 2d 31, 630 N.W.2d 201; *see also*, *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 4, 244 Wis. 2d 333, 627 N.W.2d 866. If this notion should be applicable to any circumstance, it should be to *Clark* because the *Clark* court clearly admonished that it was limiting its "hold[ing] in **these** circumstances," implying that where there are no "facts" in the "record" to which the defendant can "point," then the burden-shifting to the State does not apply. By recognizing this limitation, one does no harm to the line of cases which permit a *prima facie* challenge to be premised on items in the record beyond a transcript. Mr. Flynn recognizes that there are many layers to this onion, but he also believes that to view *Clark* with an uncritical eye does damage to other precedent, and frankly, results in a fundamentally unfair process whenever a defendant is able to meet his *prima facie* burden by reliance upon other ***objective*** portions of the ***record*** in a prior case.

B. Application of the Law to the Facts Under the De Novo *Standard.*

Mr. Flynn first takes issue with the lower court's conclusion of law that, despite his offering an affidavit to the court along with facially defective Plea Questionnaire and Waiver of Right to Attorney forms, "in the absence of a transcript" the "presumption of regularity applies **[a]nd without [a transcript]** there's simply no way for Mr. Flynn to demonstrate otherwise." R58 at 4:4-8 (emphasis added); D-App. at 106.

As he noted above, Mr. Flynn contends that the law permits **other** portions of the record—such as those he submitted—to satisfy the *Ernst/Klessig* standard. In essence, the circuit court *over*extended the *Clark* rule to prohibit *any* burden shifting in the absence of transcript. What is especially troubling about this overreaching interpretation of *Clark* is the court's failure to acknowledge that the State in *Clark* relied upon the very types of documents to establish that Clark's plea

colloquy was adequate which Mr. Flynn now relies upon to prove that his colloquy was not. How is it "fair play" to allow the State to proffer documents from the record in *Clark* (which were not the transcript, but rather, other documents) but not to allow Mr. Flynn to employ the same types of documents to prove a defective colloquy in his case?

It is Mr. Flynn's contention, based upon the argument set forth in Section I.A., *supra*, that the circuit court in this matter applied the "presumption of regularity" in an overly broad fashion not intended by the *Clark* court. As such, Mr. Flynn should have been granted a *Klessig* hearing at which the burden to prove that his prior plea colloquy comported with the Sixth Amendment fell to the State.

C. The Lower Court Also Erroneously Exercised Its Discretion.

Apart from failing as a matter of law to grant Mr. Flynn a hearing on his motion collaterally attacking his Sheboygan County conviction, the lower court also erroneously exercised its discretion by failing to recognize that he had pled sufficient facts to establish that his prior colloquy was defective. More particularly, the circuit court gave no weight to any of the following:

> The irrefutable fact that the Plea Questionnaire executed by Mr. Flynn in his prior Sheboygan County case failed (1) to list the elements of the charge to which he was pleading and (2) erroneously recorded his maximum exposure to confinement in a jail as thirty days instead of the 180 days to which he was actually exposed. R36 at p.1; D-App. at 128.
>
> The incontestable fact that the Waiver of Right to Attorney form Mr. Flynn executed did not accurately portray the range of penalties to which he was exposed upon sentencing, listing only the minimum confinement in jail without also recording his maximum exposure. R36 at p.3; D-App. at 130.
>
> The fact that Mr. Flynn averred in an affidavit under oath that the circuit court did not inform him "of what the maximum penalties for the charge were." R36 at p.6; D-App. at 133.

Taken together, the foregoing documents more than sufficiently establish *prima facie* proof that something was amiss with Mr. Flynn's 2011 plea colloquy, and in so doing, it must be acknowledged that "*prima facie*" proof of something is a **low** threshold.

According to *Black's Law Dictionary*, a "*prima facie*" case is one which becomes evident "at first sight." *Black's Law Dictionary*, p.1228 (8th ed. 2004). Clearly, establishing a *prima facie* case does not involve much. As every first-year law student learns, there exists something called the "ladder of proof." This ladder rests on the ground, which equates to the notion of no proof, while the ceiling constitutes proof beyond all doubt (or that level of proof which the law recognizes can only be known "in the mind of God"). Jurisprudentially speaking, there is no aspect of any sphere of the law—whether it be the Law of Contract, Tort, Property, Corporations, *etc*.—which imposes either of these two standards upon a party. As one begins to climb this ladder, however, the rungs one encounters are respectively: (1) a quantum of evidence; (2) *prima facie* evidence; (3) that evidence which establishes reasonable suspicion; (4) evidence rising to a probable cause belief; (5) a preponderance of evidence; (6) followed by clear, satisfactory, and convincing evidence; and (7) finally ending in proof beyond a reasonable doubt. On this ladder, *prima facie* proof of something is the **second-lowest** rung—that is to say, it does not take much to satisfy this burden which sits barely above a "quantum of proof" and below a "reasonable suspicion."

In the end, what can one ultimately ascertain about the circumstances of Mr. Flynn's challenge to his prior conviction which cannot reasonably be disputed? The answer to this question is as follows: *Clark* held that if there is a defect in the **record** of a prior case, the *Bangert* burden-shifting rule applies. Plea Questionnaire and Waiver of Right to an Attorney forms are inarguably a part of a court "record." When Mr. Flynn executed these forms in his Sheboygan County case, they demonstrated ***on their face*** that he did not fully understand the maximum penalties to which he was exposed, nor did he acknowledge the elements of the charge to which he was pleading. R36; D-App. at 128-33. Since the Latin for "**on its face**" is "*prima facie*," Mr. Flynn adequately and sufficiently pled his case under *Clark* and *Bangert*, and the burden should have shifted to the State to prove otherwise—the *Clark* decision has changed *nothing* in this regard. It was thus error for the circuit court to ignore these defects and assume that the "presumption of regularity" could simply "sweep them under the carpet" to use a well-understood turn of phrase.

It must also be recalled that the defective Plea Questionnaire and Waiver of Right to Attorney forms do not stand in a vacuum. Rather, they must be considered in light of Mr. Flynn's affidavit in which he averred that he was misinformed about

the maximum penalties to which he was exposed in the Sheboygan County case and that the circuit court failed to disabuse him of his misapprehension. R36 at p.6, ¶¶ 5-6; D-App. at 133. Mr. Flynn's averment in this regard is ***bolstered*** by the documentary evidence from the Sheboygan County matter, and for reasons unknown, the lower court in this matter failed to account for this reinforcement when considering whether Mr. Flynn had made a *prima facie* case. Instead, the circuit court came to an unreasonable, untenable, and erroneous conclusion that there was "simply no way for Mr. Flynn to demonstrate" that the 2011 colloquy was defective. R58 at 4:7-8; D-App. at 105. One must rhetorically question: If an affidavit, supported by documentary proof, is not sufficient to establish a *prima facie* case for a *Klessig* hearing, what would it take? It is Mr. Flynn's contention that, in the face of the proof he offered, the lower court abused its discretion in denying him a hearing on his motion collaterally attacking his prior Sheboygan County conviction.

CONCLUSION

Because the circuit court misapprehended the legal standard to be applied in circumstances in which a defendant collaterally attacks a prior conviction, its denial of Mr. Flynn's motion was in error as a matter of law. Furthermore, because the lower court "gave short-shrift" to Mr. Flynn's proof of a defective colloquy based upon both his affidavit and the documents he submitted in support thereof, the circuit court abused its discretion in denying him a hearing. Based upon these defects, Mr. Flynn respectfully requests that this Court reverse the decision of the court below and remand his case with direction to grant him a hearing on his motion collaterally attacking his prior 2011 Sheboygan County conviction, shifting the burden to the State to prove that the same was not defective.

Dated this 20th day of February, 2025.

Respectfully submitted:

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Electronically signed by:
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Attorneys for Matthew John Flynn,
Defendant-Appellant

CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,661 words.

I also certify that filed as a separate document is an appendix that complies with Wis. Stat. § 809.19(2)(a).

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 20th day of February, 2025.

MELOWSKI & SINGH, LLC

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