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

REPLY BRIEF DEFENDANT-APPELLANT

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ARGUMENT

I. THE STATE.

In a manner which plays directly into the concerns expressed by the dissent in *State v. Clark*, 2022 WI 21, 401 Wis. 2d 344, 972 N.W.2d 533, the State recounts that the circuit court "noted without the transcript, there's simply no way for Flynn to demonstrate otherwise. [R 58 at 4:4-11]." State's Response Brief at p.5[1] [hereinafter "SRB"]. The "logic" inherent in this statement is precisely what gave rise to the concern of the dissent in *Clark* when it opined:

> [T]he majority leaves in its stead **a hurdle that is nigh insurmountable for a defendant**. The majority dismisses the presumption against waiver of counsel with a wave of the hand, tucking it away in a footnote, and failing to weigh it against the competing presumption of regularity.

Clark, 2022 WI 21, ¶ 25 (Bradley, J., dissenting)(emphasis added). The dissent continued:

> The majority's second error lies in foisting upon Clark and similarly situated defendants **a nearly impossible burden**. Making things worse is the fact that defendants are saddled with this burden due to no fault of their own but merely because of the operation of document retention rules which likely are outdated given the reality of today's electronic filing and storage. Indeed, given the vast amounts of electronic data that can be stored in a relatively small physical area and the complications that may arise due to the destruction of case files, it may be time for this court to consider revisiting the record retention rules that caused the scenario we face here.

Id. at ¶ 45 (Bradley, J., dissenting)(emphasis added). It is the foregoing premise—that the burden has now become insurmountable—which renders the approach to

[1] Mr. Flynn will refer to specific pages of the State's brief as though it had been properly paginated under Wis. Stat. § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover**." Wis. Stat. § 809.19(8)(bm) (2025-26)(emphasis added). The State begins numbering the pages of its response brief with the notation that its actual page two is page "i," and then continues sequentially therefrom using lower case Roman numerals until it reaches its *actual* page four where it begins its Arabic sequence. The State left its cover page unnumbered as well. The State's numbering format is contrary to the statutory rule. Given this discrepancy, Mr. Flynn will refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as an Arabic numbered page one (1) as it should have been.

the *Clark-Klessig*[2] dichotomy Mr. Flynn described in his initial brief as the correct one because it (1) does harm to neither holding, (2) acknowledges, as the *Clark* court did, that there are other means by which the "record" may establish error, and (3) dilutes the "insurmountability" problem which the *Clark* dissent identified. If anything was accomplished by the State's identification of the circuit court's assumption, it was to bolster Mr. Flynn's interpretation of the law.

Beyond the foregoing, however, there is a fatal flaw in the State's argument "that if the defendant cannot point to **a defect in a transcript**, the defendant has not met the burden of showing a prima facie challenge, ..." SRB at p.8 (emphasis added). The problem with the State's contention is that it is far too narrow in that it (1) ignores the facts of *Clark* and (2) does not account for other common law decisions which speak of the "record" as including more than just a transcript.

First, with regard to the facts of *Clark*, the State conveniently overlooks the fact that when it attempted to establish the regularity and validity of Clark's plea colloquy, it 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. *Clark*, 2022 WI 21, ¶ 6. The *Clark* court did *not* find 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, 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. In the instant case, in addition to submitting an affidavit, Mr. Flynn also submitted a Plea Questionnaire/Waiver of Rights and Waiver of Right to an Attorney forms which, as part of the *record*, helped to establish his *prima facie* case. R35; R36.

Second, other cases—notably, upon which the *Clark* court relied when crafting its holding—also do *not* confine the term "record" to mean only the transcript. In *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92, the court stated:

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

> [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, and since the additional documents that Mr. Flynn submitted to the circuit court demonstrate defects in the proceedings, he has established a *prima facie* case which should have shifted the burden to the State. More particularly as Mr. Flynn noted in his initial brief, the additional documentation established 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, the State's protestations to the contrary notwithstanding.

CONCLUSION

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 8th day of July, 2025.

Respectfully submitted:

MELOWSKI & SINGH, LLC

Electronically signed by:
Sarvan Singh, Jr.
State Bar No. 1049920
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 1,503 words.

Additionally, 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 8th day of July, 2025.

MELOWSKI & SINGH, LLC

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