STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2014AP2561
(Racine County Case 2005CF324)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID MCALISTER, SR.,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Affirming an Order of the Circuit Court for Racine County, the Honorable Emily S. Mueller, Circuit Judge, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUES PRESENTED FOR REVIEW

The central issue at trial was whether McAlister participated in the charged robberies. The state's evidence on that point consisted entirely of the allegations of two confessed participants seeking to mitigate the consequences of their own misconduct. The jury knew that the state's witnesses had a motive to falsely accuse McAlister but those witnesses denied under oath having done so.

Under these circumstances, are the allegations of

McAlister's Wis. Stat. §974.06 motion sufficient to require a new trial and therefore an evidentiary hearing on his claim of newly discovered evidence from three separate witnesses swearing that, prior to trial, the state witnesses admitted that they intended to falsely accuse McAlister?

This question necessarily includes the following subissues:

a. Is the new evidence that, prior to trial, the state's witnesses admitted that McAlister was *not* involved in the robberies and that they nonetheless intended to frame him for them insufficient to support a newly discovered evidence claim on the grounds that it "merely tend[s] to impeach the credibility of witnesses?"

b. Is that new evidence that McAlister was not involved in the robberies "cumulative" of evidence that the state witnesses had a motive to falsely accuse him?

c. Are the pretrial admissions by the state's witnesses that McAlister was not involved in the robberies and that they nonetheless intended to frame him for them "recantations" requiring corroboration and, if so, are they adequately corroborated?

d. Do the newly discovered pretrial admissions by the state's witnesses that McAlister in fact was not involved in the robberies create a reasonable probability of a different result?

The circuit court denied McAlister's *pro se* due process challenge based on newly discovered evidence, concluding without a hearing that the affidavits had "limited credibility," that the pretrial admissions were "recantations," and that those "recantations" were not adequately corroborated. On his *pro se*

appeal, the Court of Appeals affirmed on different grounds, concluding that the state witnesses' pretrial admissions to falsely accusing McAlister were "mere[] impeach[ment]" and "cumulative" to evidence that they had a motive to falsely accuse him.

The Court of Appeals summarily denied the reconsideration motion filed by *pro bono* counsel. Judge Hagedorn concurred, however, admitting that the court's original rationale was legally invalid. He nonetheless concluded that the circuit court had the discretion to find that the affidavits were incredible without a hearing and that they thus would not create a reasonable probability of a different result.

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

STATEMENT OF THE CASE

Three separate people have sworn that the state's two key witnesses against David McAlister admitted to them, prior to the trial, that they intended to falsely accuse McAlister of involvement in the crimes to reduce their own punishment. Wendell McPherson swore that, prior to the trial, Alphonso Waters spoke to him in prison about Waters' fear the state would realize that he was lying about McAlister's involvement to improve his own position in the justice system (R47). Corey Prince swore that, prior to the trial, Nathan Jefferson, told him at the Racine County Jail that Waters instructed him to lie about McAlister's involvement so they could get shorter sentences (R47:5). Antonio Shannon swore that, prior to the trial, Jefferson told him in a different conversation at the Racine County Jail that he had an "out" that would only work if he and Waters testified

against someone Jefferson "said was not involved in the robbery" (R48).

McAlister first learned of these three witnesses after his trial and after his direct appeal of his conviction on two counts of armed robbery and one count of possession of a firearm. Believing that he now had evidence of Waters and Jefferson falsely accusing him, rather than just a motive for them to do so, he moved for a new trial on the basis of newly-discovered evidence. (R46-R48). He appeals from the lower courts' refusal even to allow an evidentiary hearing on that motion.

A. The Trial

Having been caught for their own wrongdoing and accepting plea deals by the state (R72:17-18, 42-49), Waters and Jefferson provided the exclusive evidence at trial directly tying McAlister to three separate robberies (*see* R76:20-22; App. 16-18 (circuit court quoting state's closing argument)). Based on their testimony, a jury found McAlister guilty of two of those robberies and a related charge of felon in possession of a firearm but acquitted him of the third. (R28-R30; R73:102-03).[1]

The fact of the robberies and the involvement of Jefferson and Waters in two of them is not disputed.

Two convictions concerned an attempted armed robbery of the Catholic Community Credit Union by Nathan Jefferson and a female accomplice on December 21, 2004 (R73:32, 38 (Counts 4 & 5)). The other concerned an armed robbery of Wisconsin Auto Title Loan by Jefferson, Waters, and the same female accomplice on December 28, 2004 (*id.*:40 (Count 6)). Jefferson and Waters claimed that they committed each of these

[1] The state dismissed charges related to another alleged robbery at the beginning of trial and had dismissed another felon in possession charge earlier for lack of evidence (R59:2; R70:2-4)

robberies at the direction of McAlister and that McAlister provided the gun and drove the getaway car (*e.g.*, R71:39-51; R72:19-37).

Jefferson and Waters also claimed that McAlister admitted to them his involvement in the robbery of a Piggly-Wiggly store (*e.g.*, R71:53-56; R72:37-38, 44), but the jury acquitted McAlister of those charges (Counts 1-3) (R25-R27; R73:102-03).

The only real dispute at trial was whether, as Jefferson and Waters – and only Jefferson and Waters – claimed, McAlister was involved in the three robberies. As the prosecutor explained in his closing argument:

> . . . And really what it all boils down to, more than anything else, is do you believe Anthony Waters (sic) and/or Nathan Jefferson or don't you?
>
> . . . If you believe them, either/or, you'll find the defendant guilty; and quite frankly, if you don't believe what they told you, there is no way to find the defendant guilty.
>
> There is not enough other evidence of his involvement to find him guilty of these crimes if you don't believe them when they say he was involved.

(R73:59-60; *see id.*:69; *see also* R70:95 (state's opening)).

The state's court of appeals brief adequately summarizes the trial evidence from which the jury might have discredited its witnesses:

> In exchange for Waters' and Jefferson's testimony, the State agreed to "reduce the exposure for both of the witnesses, and once the exposure was reduced, make a recommendation as to what the ultimate sentence should be" (72:44-46).
>
> Waters was the State's first witness. On cross-examination, defense counsel asked Waters about several incidents in which he had either lied to the

> police about his involvement in a particular crime or used a false name to escape detection, and Waters admitted that, in those instances, he had been willing to lie to keep himself out of jail (71:121-22, 127-31). Waters refused, however, to acknowledge the consideration he had received for his testimony (71:151-53; 72:46). The next day, the court read to the jurors a joint stipulation prepared by the parties, informing them that the State had agreed to reduce Waters' exposure and recommend less prison time, and that Waters knew about the agreement before he testified (42:3; 72:17-18).
>
> When Jefferson testified, he acknowledged his plea agreement with the State (72:42, 45-49). Defense counsel cross-examined Jefferson extensively about his negotiations with the State (72:45-49). Jefferson also admitted that he had originally lied to investigating officers about his involvement in one of the robberies because he didn't want to go to jail (72:50-51). Only when he was convinced that the police had sufficient evidence to convict him of that robbery did Jefferson, hoping for leniency, tell them about his role in the robbery and implicate McAlister (72:52-54).

State v. McAlister, Appeal No. 2014AP2561, State's Court of Appeals Brief at 2-3.

As the trial prosecutor emphasized throughout his closing, however, there was no direct evidence that the state's witnesses had colluded to frame McAlister (R73:61-62, 65-67, 94), and the witnesses denied having done so (*e.g.*, R72:38-39).

The circuit court sentenced McAlister to 25 years initial confinement and nine years extended supervision on the three counts for which he was convicted (R36; R74:12-18).

B. Post-Conviction Proceedings

After an unsuccessful direct appeal (R42-R44), McAlister learned that, not only did Waters and Jefferson have a motive to falsely accuse him, but they in fact had admitted to others prior to trial that McAlister was *not* involved in the robberies and that

they were only accusing him to mitigate their own punishment. He therefore filed a *pro se* motion under Wis. Stat. §974.06 on the grounds that the newly discovered evidence of innocence gave him a due process right to a new trial. (R46-R48).

Again, the state's summary suffices here:

> On May 19, 2014, McAlister filed another postconviction motion, this time seeking a new trial based on newly-discovered evidence "that the primary witnesses against [him] conspired to frame him to obtain favor from the State" (46:1). In support of his motion, McAlister submitted affidavits from three men who claimed that Waters and Jefferson had confessed to lying about McAlister's participation in the robberies (47; 48).
>
> According to his affidavit, Wendell McPherson was in prison with Alphonso Waters before he testified at McAlister's trial (47:1-4). Waters allegedly told McPherson about the plea agreement he had with the State and that he was afraid the State would find out that he and Jefferson were lying about McAlister's involvement in the robberies (47:2). Confronted with a video recording showing him committing one of the robberies, Waters said he asked the police for a deal (47:2). Waters told McPherson that "he needed to come up with a lie so that he can throw somebody under the bus and that's when David McAlister entered his mind" (47:2). When McPherson asked why he was going to lie about McAlister's part in the robberies, Waters told him that "[h]e didn't like Mr. McAlister and he wanted to get Mr. McAlister out of the picture" (47:3). Waters also said he'd written to Jefferson and told him "exactly what to say because he had made a plea deal and he want they [sic] statements to collaborate so Mr. Jefferson can get a plea deal as well" (47:3). Finally, McPherson stated that he helped Waters prepare for McAlister's trial by helping Waters "rehearse[] the lies that he testified to so he would be believable" (47:3).
>
> The second affidavit was from Corey Prince (47:5). Prince stated that he was in the Racine County

> Jail with Nathan Jefferson in 2006 and 2007, before Jefferson testified at McAlister's trial (47:5). During that time, Prince claimed that Jefferson told him that Alphonso Waters, who was also known as "Bird," had instructed him on "exactly what to say in regards to their pending case" and to lie about "the older man" being involved "so that they could receive a shorter sentence" (47:5). Prince alleged that several years later, in 2012, he was in Waupun Correctional Institution with McAlister when he overheard McAlister complaining that "Nate" and "Bird" had set him up by lying and implicating him in robberies they had committed (47:5). At that point, Prince introduced himself to McAlister and told him about the conversation(s) he'd had with Jefferson back in 2006-07 (47:5).
>
> The third affidavit came from Antonio Shannon, who stated that he and his friend, Amanda, had actually seen Jefferson commit one of the robberies at issue, which had taken place at an auto loan business (48:1). Two years later, Shannon happened to be in the Racine County Jail with an inmate who turned out to be Jefferson (48:1). They talked and learned that they both knew Amanda (48:1). When Jefferson later confessed to the auto loan robbery [fn. omitted], Shannon told Jefferson that he'd seen him running from the scene (48:1). Jefferson allegedly said that he had "an out[,]" but it would only work if "Bird" said the same thing (48:1). The next day, Jefferson told Shannon that he had a plea deal "if he took the stand against someone he said was not involved in the robbery" (48:2).

State v. McAlister, Appeal No. 2014AP2561, State's Court of Appeals Brief at 4-5.

After argument in which McAlister appeared without counsel and explained his position that (1) the pretrial admissions recounted in the affidavits were not "recantations" and (2) that each of the three affidavits corroborated the others without need to reference the alternative corroboration method from ***State v. McCallum***, 208 Wis.2d 463, 476, 561 N.W.2d 707 (1997) (R76:17-18, 27), the circuit court denied McAlister's

motion without an evidentiary hearing. (R76:28-30; App. 19-21).

Viewing the newly discovered pre-trial admissions as "recantations," the court found that McAlister did not show either a newly discovered motive for the witnesses' trial perjury or that those admissions bore circumstantial guaranties of trustworthiness under the alternative corroboration method in ***McCallum***, *supra*. The court also deemed one of the three affidavits as "inherently not believable" because the affiant admitted having helped a state witness concoct his testimony. Despite having previously cited the importance of the state witnesses' testimony and of the absence at trial of any evidence of collusion between them (R76:20-22; App. 16-18), the court concluded that there was no reasonable probability of a different result (R76:28-30; App. 19-21). The court neither acknowledged nor addressed McAlister's argument that the three separate newly discovered admissions to framing him corroborated each other.

The court's written decision and order (drafted by the prosecutor (R76:30; App. 21)) stated not that any of the new witnesses' sworn affidavits was incredible, but that they "have limited credibility." It then repeated the finding that the state witnesses' motives for lying were not newly discovered and that there was no circumstantial guarantee of trustworthiness for the recantations (R52; App. 8).

The Court of Appeals rejected McAlister's *pro se* appeal (App. 1-5), although holding simply that the new evidence was "cumulative" and mere impeachment evidence insufficient as a matter of law (App. 5). Specifically, that court concluded that

> the three affidavits McAlister submitted in support of his postconviction motion were merely an attempt to retry the credibility of Waters and Jefferson, whose credibility was well-aired at trial. Evidence does not

> warrant a new trial when, as here, it would merely tend to impeach the credibility of witnesses. ***State v. Machner***, 92 Wis.2d 797, 806, 285 N.W.2d 905 (Ct. App. 1979). Because the three affidavits were cumulative, they did not satisfy the requirements for newly discovered evidence. [Citation omitted]. Therefore, McAlister did not allege sufficient material facts that, if true, would entitle him to the relief sought, i.e., a new trial. [Citation omitted].

(App. 5).

On March 3, 2017, the Court of Appeals summarily denied *pro bono* counsel's timely motion for reconsideration raising the same defects in that court's analysis raised here (App. 6-7). While Judge Hagedorn, concurring, admitted that the court had applied the wrong legal standards, he nonetheless concluded that the circuit court could have legitimately found the new witnesses to be incredible without a hearing and therefore could conclude that the new evidence would not create a reasonable probability of a different result (App. 7).

This Court granted review on September 11, 2017.

ARGUMENT

BECAUSE HIS FACTUAL ALLEGATIONS, IF TRUE, ENTITLE HIM TO A NEW TRIAL, MCALISTER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS NEWLY DISCOVERED EVIDENCE MOTION[2]

"Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to

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[2] Because McAlister and his attorneys were unaware of the newly discovered evidence at the time of trial and his direct appeal, his motion satisfies the "sufficient reason" requirement of Wis. Stat. §974.06(4). *See* ***State v. Escalona-Naranjo***, 185 Wis.2d 168, 182 n.11, 517 N.W.2d 157 (1994); ***State v. Edmunds***, 2008 WI App 33, ¶11, 308 Wis.2d 374, 746 N.W.2d 590.

prison." ***United States v. Bernal-Obeso***, 989 F.2d 331, 334 (9th Cir. 1993); *see, e.g.*, ***On Lee v. United States***, 343 U.S. 747, 757 (1952) (use of such informers "may raise serious questions of credibility"). Rarely do such witnesses admit that they are framing an innocent person, and when they do, we should not blithely dismiss such admissions.

Here, McAlister satisfied the requirements for a hearing on his newly-discovered evidence claim, having presented newly discovered evidence that he was not simply unfairly convicted, but that he is factually innocent of the charges against him. The lower courts nonetheless denied him that hearing based on a variety of findings that reflect much confusion regarding the applicable legal standards.

A. The Applicable Legal Standards

1. The general standards for newly discovered evidence

The general standards for a newly discovered evidence claim are well-settled if not always well-understood:

> To obtain a new trial based on newly discovered evidence, a defendant must establish by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." [***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis.2d 639, 700 N.W.2d 98] (citation omitted). Once those four criteria have been established, the court looks to "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). The reasonable probability factor need not be established by clear and convincing evidence, as it contains its own burden of proof. *Id.*, ¶¶160-62 (abrogating ***State v. Avery***, 213 Wis.2d 228, 234-37, 570 N.W.2d 573 (Ct. App. 1997)).

State v. Edmunds, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590.

"A reasonable probability of a different result exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis.2d 111, 700 N.W.2d 62 (citation omitted). The defendant, moreover, need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors. ***Kyles v. Whitley***, 514 U.S. 419, 434-35 (1995). Rather, he need only show a reasonable probability of a different result. ***Love***, *supra*.

If the new evidence is in the form of a "recantation," the recantation must be corroborated by other newly discovered evidence. ***McCallum***, 208 Wis.2d at 476. *See* Section B,3,a, *infra*.

Newly discovered evidence is a matter of due process. *E.g.*, ***Love***, 2005 WI 116, ¶43, n.18.

2. The general standards for assessing the adequacy of a motion to require a hearing

"If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing" unless "the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis.2d 358, 805 N.W.2d 334 (citation and internal quotation omitted). Also, while McAlister submitted his new evidence in the form of sworn affidavits, he was not required to do so; making the allegations in the motion itself would have been sufficient. *E.g.*, ***State v. Brown***, 2006 WI 100, ¶62, 293 Wis.2d 594, 716 N.W.2d 906. In assessing the sufficiency of a motion, its factual allegations must be accepted as true. ***Balliette***, 2011 WI 79, ¶12.

3. The applicable standards of review

Sufficiency of a motion to require a hearing is a question of law, which this Court reviews *de novo*. ***Balliette***, 2011 WI 79, ¶18. Although the circuit court's underlying findings of fact generally are upheld unless clearly erroneous, ***State v. Jackson***, 2016 WI 56, ¶45, 369 Wis.2d 673, 882 N.W.2d 422, the allegations of McAlister's motion must be accepted as true absent an evidentiary hearing. ***Balliette***, 2011 WI 79, ¶12.

The standard of review of whether newly discovered evidence mandates a new trial as a matter of due process, however, is unclear and this Court's pronouncements inconsistent. *Compare* ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis.2d 407, 826 N.W.2d 60 (erroneous exercise of discretion), *with* ***In re Commitment of Sorenson***, 2002 WI 78, ¶25, 254 Wis.2d 54, 646 N.W.2d 354 ("Due process determinations are questions of law that we decide *de novo*.").

Consistency and logic dictate that assessment of whether due process requires a new trial on newly discovered evidence grounds be subject to the same standards applicable to review of other constitutional questions, with review of factual findings for clear error and application of legal standards to such facts reviewed *de novo*. *See, e.g.*, ***Jackson***, 2016 WI 56, ¶45 (the appellate court independently determines application of constitutional law to given facts). Whether evidence is "new" is a purely factual issue, while questions of negligence and whether evidence is material or cumulative require application of legal standards to facts as found. Attempting to shoehorn newly discovered evidence into an "erroneous exercise of discretion" standard merely causes unnecessary complexity and confusion.

Such confusion is most apparent regarding the "reasonable probability" analysis. Indeed, although this Court

has expressly stated that that prong presents an issue of law reviewed *de novo*, ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis.2d 28, 750 N.W.2d 42, it later cited that very case as supporting "erroneous exercise of discretion" review of that prong, ***Avery***, 2013 WI 13, ¶32.

Consistency and logic dictate application here of the same *de novo* standard elsewhere applicable to the "reasonable probability" analysis. *E.g.*, ***State v. Harris***, 2004 WI 64, ¶11, 272 Wis.2d 80, 680 N.W.2d 737 (issues of constitutional fact, such as whether evidence withheld by the state is "material" by creating a reasonable probability of a different result, are reviewed independently); ***State v. Thiel***, 2003 WI 111, ¶¶23-24, 264 Wis.2d 571, 665 N.W.2d 305 ("reasonable probability of a different result" on ineffectiveness claim is reviewed *de novo*). Since "reasonable probability of a different result" review assesses prejudice to the defendant, it is a form of harmless error review, a process that this Court likewise has recognized must be reviewed *de novo*. *E.g.*, ***State v. Jackson***, 2014 WI 4, ¶44, 352 Wis.2d 249, 841 N.W.2d 791 (citation omitted).

B. McAlister's Motion Was Adequate to Require an Evidentiary Hearing

McAlister's motion presented three affidavits attesting to interlocking, newly discovered pretrial admissions by Jefferson and Waters detailing their intent and efforts to mitigate the legal consequences of their own misconduct by framing McAlister for these robberies he did not commit (R46-R48). Applying the required standards, McAlister's motion alleges facts that, if true, show that he is entitled to relief under the due process standard for newly discovered evidence.

Neither the state nor the lower courts have suggested that McAlister failed to satisfy the first three requirements. Evidence of the state's witnesses' admissions to framing him for

something he did not do was new since he did not have that information at trial. Nor is there any suggestion that he or his trial counsel were negligent in not finding the evidence earlier. There likewise is no suggestion that admissions by the only witnesses tying McAlister to the crimes for which he was convicted that they framed him and that he was not actually involved are immaterial.

Rather, the only claimed defects in McAlister's motion are that (1) "mere impeachment" cannot form the basis for a newly discovered evidence motion, (2) newly discovered admissions by the state's two critical witnesses that McAlister was not involved in the crimes but they would frame him anyway would be "cumulative" to evidence that, despite their testimony under oath at trial that they did not frame him, they had a motive to do so, (3) Waters' and Jefferson's newly discovered pretrial admissions that McAlister was *not* involved in the robberies but that they intended to frame him anyway were recantations for which corroboration was absent, and (4) those newly discovered confessions by the state's critical witnesses that they planned to commit perjury by falsely claiming that McAlister was involved could not have created a reasonable probability of a different result at trial.

None of the reasons proposed to deny McAlister relief is consistent with law or logic.

1. The Court of Appeals' "mere impeachment" theory is legally baseless

The Court of Appeals incorrectly affirmed denial of a hearing on McAlister's newly discovered evidence claim, holding that the affidavits "were merely an attempt to retry the credibility of Waters and Jefferson." The Court of Appeals was wrong for two reasons. First, although it cited ***State v. Machner***, 92 Wis.2d 797, 806, 285 N.W.2d 905 (Ct. App. 1979), for the

proposition that "[e]vidence does not warrant a new trial when, as here, it would merely tend to impeach the credibility of witnesses" (App. 5), the law recognizes that even mere impeachment evidence can justify retrial on newly discovered evidence grounds. *E.g.*, ***State v. Plude***, 2008 WI 58, ¶47, 310 Wis.2d 28, 750 N.W.2d 42. Second in any event, the admissions were affirmative evidence of McAlister's innocence and not mere impeachment.[3]

The Court of Appeals' decision overlooks and conflicts with a number of well-established and controlling principles of law. First, the suggestion that evidence that merely impeaches the credibility of a witness cannot justify a new trial on newly discovered evidence grounds no longer is valid law, if it ever was valid law. The theory originally underlying that policy is that "mere impeachment" evidence cannot, as a matter of law, create a reasonable probability of a different result. *See* ***Machner***, 92 Wis.2d at 806, citing ***Greer v. State***, 40 Wis.2d 72, 78, 161 N.W.2d 255 (1968).

However, when ***Greer*** speaks of "mere impeachment" evidence, its target is "general impeachment" evidence, such as the fact a witness has a certain number of convictions, which renders the witness generally less credible than other witnesses.[4] It does not include "specific impeachment" which undermines the credibility of the witness' specific allegations or demonstrates bias or motive in the particular case. *See* Alan D. Hornstein, Between Rock and A Hard Place: The Right to Testify and

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[3] While the concurring judge below acknowledged the Court of Appeals' error in this regard (App. 7), the majority did not.

[4] The ***Greer*** Court cited ***State v. Debs***, 217 Wis. 164, 258 N.W. 173 (1935) (new evidence that plaintiff lied when she testified at trial she did not have sex with other men at times remote from the relevant time held not to be a basis for a new trial because it merely impeached her credibility).

Impeachment by Prior Conviction, 42 Vill. L. Rev. 1, 57 (1997) (explaining difference between general and specific impeachment). *See also* ***Loper v. Beto***, 405 U.S. 473, 482 n.11 (1972) (distinguishing between impeachment "used for the purpose of directly rebutting a specific false statement made from the witness stand" and evidence used simply to "blacken[] [the witness'] character and thus damag[e] his general credibility in the eyes of the jury.").

In any event, the United States Supreme Court has long rejected the Court of Appeals' legal fallacy, recognizing that impeaching, as well as exculpatory evidence, may create a reasonable probability of different result. *E.g.*, ***United States v. Bagley***, 473 U.S. 667 (1985) (prosecutor's withholding of impeachment evidence that created a reasonable probability of a different result violates due process); *see* ***Giglio v. United States***, 405 U.S. 150 (1972) (prosecutor's withholding of material impeachment evidence violates due process).

This Court likewise has rejected the lower court's legal theory. ***State v. Plude***, 2008 WI 58, ¶¶38-41, 310 Wis.2d 28, 750 N.W.2d 42 (granting new trial where newly discovered evidence that state expert misrepresented his credentials "may have been determinative of Plude's guilt or innocence" by undermining the expert's credibility, citing ***Giglio***, *supra*); *see* ***id.*** ¶47 ("Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial"), citing ***Birdsall v. Fraenzel***, 154 Wis. 48, 52, 142 N.W. 274 (1913).

The lower court's conclusion that mere impeachment evidence cannot support reversal on newly discovered evidence grounds accordingly conflicts with controlling authority.

Application of the "mere impeachment" theory here also conflicts with controlling precedent because the admissions by

Jefferson and Waters that McAlister was not involved in the crimes were not merely impeachment, but affirmative evidence of McAlister's innocence. *E.g.*, ***Vogel v. State***, 96 Wis.2d 372, 383-84, 291 N.W.2d 838 (1980) (witness's inconsistent statement is admissible for its truth, not merely as impeachment). *See* ***State v. Davis***, 2011 WI App 147, ¶24, 337 Wis.2d 688, 808 N.W.2d 130 ("Reed's testimony [that Henderson admitted Davis was not involved] directly contradicts Henderson's trial testimony. Henderson's statements to Reed do not merely serve as impeachment evidence, but rather as affirmative evidence of Davis's innocence." Citing ***Vogel***, *supra*).

Because the new evidence is affirmative evidence of innocence and not "mere impeachment" in any event, the premise of the Court of Appeals' legal theory fails.

2. Evidence that Jefferson and Waters in fact conspired to frame McAlister is not cumulative to evidence that they had a motive to do so

The pretrial statements Waters and Jefferson made to the newly discovered witnesses are confessions to framing McAlister and are affirmative evidence of his innocence. This fact undermines the Court of Appeals' conclusory assertion that the admissions that the witnesses in fact did frame McAlister are "cumulative" given the evidence that they had a possible motive to do so

Evidence is cumulative when it "supports a fact established by existing evidence." ***Thiel***, 2003 WI 111, ¶78 (citation omitted). At the same time, testimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent. ***Wilson v. Plank***,

41 Wis. 94, 98-99 (1876).

Evidence of motive is at best circumstantial evidence that someone may have committed a particular act; it is *not* equivalent to proof that they in fact committed it. *See, e.g.*, Wis. J.I.–Crim. 175 ("Evidence of motive does not by itself establish guilt").

The newly discovered evidence consisted of interlocking admissions by the state's star witnesses that, contrary to their trial testimony, McAlister was not involved in the crimes for which he was convicted (R47-R48). McAlister's lack of involvement in those crimes was not "established by existing evidence," and no other evidence showed that the state's witnesses had admitted his non-involvement. Other evidence from which the jury could conclude that the witnesses had a history of lying on other matters and a motive to lie, and that they thus *may* have lied about McAlister's involvement, did not "establish[]" that they in fact acted on that motive here.

The trial prosecutor's closing argument powerfully emphasized the difference between a possible motive, which was all the evidence available at trial could prove, and actual evidence of collusion of the type reflected in the newly discovered evidence. While noting that Jefferson's and Waters' testimony was "remarkably consistent" (R73:65, 66), he found the need to emphasize the lack of evidence that the two had colluded (*See id.*:61-62 ("And there is no evidence that these two colluded together. There is none." "There can only be speculation and you cannot base a decision on speculation. There is no evidence they colluded together to come up with this story." "They said they didn't have any contact after the robberies.")).

> Now, quite frankly, the only way that Mr. Jefferson and Mr. Waters could have testified so

> consistently with each other, only two ways. One, it's true; or two, this is some sort of elaborate conspiracy that they set up. . . ..
>
> There's no evidence they ever met and talked about it. . . ..
>
> And the only way you could get the stories – the testimony you got is if they occurred together or they had this conspiracy, which there is no evidence of.

(R73:66-67).

The prosecutor emphasized the absence of evidence of collusion in his rebuttal as well:

> And time after time he's asking you to speculate this might have happened. Speculate this might have happened. Speculate this might have happened. You must base your evidence on -- your decision on the evidence. Not on speculation as to what might have happened.
>
> And the evidence is there was no collusion. The evidence is there was no communication. There's not even any evidence that Mr. Waters had any idea even how to get ahold of Mr. Jefferson. Didn't even know his name.
>
> So to speculate that well, maybe they got together and did that, well, that is just speculation and that's what you're instructed not to do.

(R73:94).

Accordingly, evidence consisting of Waters' and Jefferson's own interlocking admissions that they in fact had conspired to perjure themselves and that McAlister is innocent is affirmative evidence of McAlister's innocence, not cumulative. *E.g.*, ***Thiel***, *supra*, ¶78 (quoting ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000), for proposition that additional witnesses corroborating defendant's alibi "would have added a great deal of substance and credibility" to that alibi and are not

cumulative); ***Crisp v. Duckworth***, 743 F.2d 580, 585 (7th Cir. 1984) (finding that "[h]aving independent witnesses corroborate a defendant's story may be essential" and "testimony of additional witnesses cannot automatically be categorized as cumulative").

As the Supreme Court has emphasized, someone's personal admission of wrongdoing (such as the state witnesses' admissions to falsely accusing McAlister here) is a uniquely damaging piece of evidence against him:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." ***Bruton v. United States***, 391 U.S., at 139–140, 88 S.Ct., at 1630 (WHITE, J., dissenting). *See also* ***Cruz v. New York***, 481 U.S., at 195, 107 S.Ct., at 1720 (WHITE, J., dissenting) (citing ***Bruton***). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

While ***Fulminante*** dealt with admission to a crime by a defendant, there is no reason to believe that evidence of a personal admission by a state's witness to perjury and to framing an innocent person would have any lesser impact on a jury, even where evidence of a possible motive might not have much effect.

3. The lower courts misapplied the "reasonable probability of a different result" standard

While the Court of Appeals' "mere impeachment" and "cumulative" theories thus conflict with both logic and controlling authority, the circuit court relied on different, though equally invalid, theories. Specifically, in finding that McAlister's motion failed to demonstrate a reasonable probability of a different result based on the newly discovered evidence, the circuit court held that (1) the pretrial admissions by Jefferson and Waters that McAlister was *not* involved in the robberies and that they were nonetheless framing him for them were "recantations," (2) McAlister failed to satisfy the means of corroboration for recantation evidence applied in ***McCallum***, *supra*, and (3) the three sworn affidavits provided by McAlister were insufficiently credible to require a hearing or a new trial (R52; R76:28-30; App. 8, 19-21).

a. McAlister's motion satisfies any applicable corroboration requirement

The state did not deem the circuit court's "recantation corroboration" rationale worthy of defending in the Court of Appeals, *see State v. McAlister*, Appeal No. 2014AP2561, State's Court of Appeals Brief, and the Court of Appeals chose to instead rely on its own "mere impeachment" and "cumulative" theories (App. 4-5).

They had good reason for not relying on the circuit court's "recantation corroboration" rationale. First, although the authority on this point is muddled, there is significant reason to doubt that Jefferson's and Waters' pretrial admissions of their intent to frame McAlister and that he was *not* involved in the charged robberies are in fact "recantations." Second, McAlister's evidence satisfies the established corroboration requirement

even if the state witnesses' admissions are deemed to be recantations.

i. The recantation corroboration requirement

When the newly discovered evidence is based on a recantation, the defendant has an additional burden on top of the usual five-prong standard. "The rule is that newly discovered recantation evidence must be corroborated by other newly discovered evidence." ***McCallum***, 208 Wis.2d at 476. The asserted reason for this additional requirement is that recantations are viewed as unreliable:

> There is sound reason to adhere to the requirement. Recantations are inherently unreliable. The recanting witness is admitting that he or she has lied under oath. Either the original sworn testimony or the sworn recantation testimony is false. Because of the unreliability of recantations, we reaffirm the rule that recantation testimony must be corroborated by other newly discovered evidence.

Id. (citation omitted).

As an additional alternative to producing independent new corroboration evidence, the ***McCallum*** Court held that "the corroboration requirement in a recantation case is met if: (1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." ***Id.*** at 477-78. In other words, the recantation can be self-corroborating.

ii. Jefferson's and Waters' pretrial admissions that McAlister was not involved in the charged robberies were not "recantations"

While the law is clear under ***McCallum*** that a newly

discovered "recantation" must be corroborated by other newly discovered evidence, the law is less clear regarding what constitutes a "recantation" triggering that requirement. ***McCallum's*** explanation for the requirement – i.e., that "[r]ecantations are inherently unreliable" – and the reason for that conclusion – i.e., that "[t]he recanting witness is admitting that he or she has lied under oath" – suggest that recantations are limited to statements made by the witness *after* he or she testified differently at trial. Thus, early cases equated a recantation with an "admission of perjury." *E.g.*, ***Dunlavy v. Dairyland Mut. Ins. Co.***, 21 Wis.2d 105, 114, 124 N.W.2d 73, 78 (1963); ***Mickoleski v. Becker***, 252 Wis. 307, 315, 31 N.W.2d 508 (1948); ***Loucheine v. Strouse***, 49 Wis. 623, 6 N.W. 360 (1880).

This Court nonetheless appears to have at least once required corroboration for a newly discovered evidence claim where the new evidence conflicted, not with the witnesses' prior testimony, but with his statements to police. *See* ***Horneck v. State***, 64 Wis.2d 1, 218 N.W.2d 370 (1974). However, the ***Horneck*** Court did not address why corroboration should be required under those circumstances. It also noted that Horneck's counsel did not make reasonable efforts to find the witness for trial, so rejection of the newly discovered evidence claim was justified on that ground in any event. ***Id.***

More troublesome is ***State v. Kivioja***, 225 Wis.2d 271, 592 N.W.2d 220 (1999). Kivioja sought to withdraw his no contest pleas prior to sentencing on multiple burglary charges. He argued that the 15-page letter from his co-defendant, Jody Stehle, and Stehle's subsequent testimony admitting that he had falsely told the police that Kivioja was involved in the burglaries provided a "fair and just reason" for withdrawing his pleas before sentencing. ***Id.***, 225 Wis.2d at 274, 279-81.

Although the parties' briefing does not show significant

argument on the point beyond conclusory assertions without citation, the Court concluded that Stehle's letter and testimony constituted a "recantation" of his prior unsworn statements to police and that it therefore would have to be corroborated under ***McCallum,*** *supra*, had the motion to withdraw the pleas been filed after sentencing.

> [W]e disagree with the defendant that a recantation is only unreliable when both the earlier and the later statements are made under oath. The court of appeals in ***State v. Mayo***, 217 Wis.2d 217, 579 N.W.2d 768 (Ct. App. 1998), facing the reverse of what we face here, namely a recantation not made under oath following earlier trial testimony, found that despite the fact that the conflicting statements were not both made under oath, questions of credibility were still unanswered. ***Id.*** at 229, 579 N.W.2d 768. We find that the fact that Stehle may not have perjured himself when he testified at Kivioja's motion hearing cannot establish, *per se*, that his second statement, made under oath, is credible.

Id. at 293-94.

However, because the more lenient "fair and just reason" standard for plea withdrawal applies before sentencing, the Court deemed corroboration unnecessary, requiring instead that the recantation evidence just be "worthy of belief." ***Id.*** **at** 295-96.

The ***Kivioja*** reasoning regarding when a statement is a "recantation" requiring corroboration is troublesome and should be reconsidered. First, its reasoning suggests a type of "musical chairs" approach, with the question of whether a statement is a "recantation" unreliable enough to require corroboration turning on when the music stops.

Here, for instance, Waters and Jefferson made a number of inconsistent statements over time in the following order:

1 - They told police they were not involved in the

robberies (R71:120; R72:40, 50-51)

2 - They admitted they were involved and told police McAlister also involved (*e.g.*, R72:53-54, 81-82, 90-91)

3 - They made statements to newly discovered witnesses admitting that Jefferson/Waters were involved but McAlister was not (R47; R48)

4 - Trial testimony admitting they were involved and claiming McAlister also involved (*e.g.*, R71:39-51; R72:19-37).

Under the ***Kivioja*** analysis, each of statements 2-4 conflicts with (i.e., recants) a prior statement and thus logically would be deemed a recantation and inherently unreliable absent corroboration. Yet, corroboration is not required when such statements are offered by the state to prove guilt beyond a reasonable doubt. *See, e.g.*, ***State v. Samuel***, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423 (conviction based on witness' unsworn pretrial statements to police inculpating the defendant, made after she previously refused to implicate him in the crime, despite witness' sworn testimony at trial that pretrial statements were coerced and untrue).

Second, there is no rational basis for concluding that a co-participant's or a cooperating witness' statements inculpating the defendant are more credible or reliable than are statements exculpating the defendant. Indeed, experience and the law are to the contrary. Statements by those seeking to avoid the consequences of their own misconduct, such as the allegations by Jefferson and Waters against McAlister, are themselves inherently unreliable. *See, e.g.*, ***On Lee v. United States***, 343 U.S. 747, 757 (1952) (use of such informers "may raise serious questions of credibility"); ***United States v. Bernal-Obeso***, 989 F.2d 331, 334 (9th Cir. 1993) ("Our judicial history is speckled

with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison"); ***Dudley v. Duckworth***, 854 F.2d 967, 972 (7th Cir. 1988) ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses").

Third, the original rationale for the recantation corroboration requirement may make sense when a witness recants prior sworn testimony as in ***Mayo***, *supra* (i.e., an admission to perjury is inherently unreliable, ***McCallum,*** 208 Wis.2d at 476). However, that rationale does not apply when, as here, the conflicting statement is made *before* the witness testifies under oath. It certainly does not apply when the statement, when made, merely conflicted with prior unsworn assertions. The mere fact that a witness has made conflicting statements is an issue for the jury; it does not render the statements "inherently unreliable." Even "glaring discrepancies in the testimony of a witness at trial, or between his trial testimony and his previous statements, . . . does not result in concluding as a matter of law that the witness is wholly incredible." ***Ruiz v. State***, 75 Wis.2d 230, 232, 249 N.W.2d 277 (1977).

Because Jefferson's and Waters' statements detailing their intent to frame McAlister and admitting that McAlister was not involved in the charged robberies were made *before* they testified against him, they thus were not "recantations" subject to ***McCallum's*** corroboration requirements.

iii. McAlister satisfied any corroboration requirement even if Jefferson's and Waters' admissions are deemed "recantations"

Even if Jefferson's and Waters' pretrial statements

confessing their scheme to frame McAlister for robberies he did not commit could be deemed "recantations" subject to ***McCallum's*** corroboration requirement, his motion satisfies that requirement.

The general rule under ***McCallum*** is that newly discovered recantation evidence must be corroborated by other newly discovered evidence. 208 Wis.2d at 476-78. As McAlister argued repeatedly in the circuit court, he satisfied this requirement because the evidence provided by each of the three newly discovered witnesses corroborated that provided by the others regarding the state's witnesses' admissions to framing him for robberies he did not commit, thus satisfying this requirement (R76:17, 18, 27). *See, e.g.*, ***Chambers v. Mississippi***, 410 U.S. 284, 300 (1973) ("The sheer number of independent confessions provided additional corroboration for each").

The prosecutor and circuit court, however, overlooked that showing, instead focusing on whether McAlister satisfied an alternative form of self-corroboration approved by ***McCallum*** and concluding that he did not. Specifically, ***McCallum*** held that one way to satisfy the corroboration requirement is if the defendant presents newly discovered evidence of "a feasible motive for the initial false statement" and, "there are circumstantial guarantees of the trustworthiness of the recantation," 208 Wis.2d at 477-78. The motive of the state's witnesses to frame McAlister was known at trial and therefore not newly discovered (*see* R76:28-30; App. 19-21).

However, failing to satisfy one of multiple alternative means of showing corroboration is irrelevant where, as here, McAlister satisfied a different alternative. Specifically, McAlister's motion provided multiple affidavits from multiple witnesses to multiple statements by both of the state's witnesses confessing to framing McAlister and admitting that he was not

involved in the charged robberies. All of that information was newly discovered and each of the affidavits and statements corroborates each of the others. *See, e.g.*, ***Chambers***, *supra*.

Nor is there any rational argument that the affidavits are insufficient to corroborate each other because they do not provide identical information. Nothing close to perfect overlap is required:

> We do not deem it necessary that all the facts stated to be the truth in the perjurer's affidavit must be corroborated by other newly discovered evidence in order to grant the new trial on this ground, but only that the corroboration extend to some material aspect thereof.

Dunlavy, 21 Wis.2d at 114–15.

The affidavits corroborate each other at least on the material facts that (1) McAlister was not involved in the charged robberies and (2) that Jefferson and Waters nonetheless sought to frame him for those robberies to reduce the consequences of their own misconduct. (R47; R48).

b. The lower courts misconstrued and misapplied the circuit court's limited role in assessing the credibility of newly discovered evidence

Although the concurring judge below confessed error on the Court of Appeals' "mere impeachment" and "cumulative evidence" theories, he nonetheless concluded that the circuit court implicitly deemed McAlister's new witnesses to be "inherently unbelievable"(albeit without so much as a hearing), that this "finding" was not unreasonable, and that their evidence accordingly would not create a reasonable probability of a different result as required for reversal on newly discovered evidence grounds. (App. 7). Both the circuit court and the concurring judge below applied the wrong legal standard and

consequently reached the wrong conclusion.

i. The circuit court's role in assessing credibility of new evidence

The circuit courts retain a role, albeit a limited one, in assessing the credibility of alleged newly discovered evidence. As indicated by the newly discovered evidence standard, the defendant must prove facts by clear and convincing evidence that meet the legal requirements that the evidence is new, material, and not cumulative, and that the defense was not negligent in failing to discover the evidence before trial. *E.g.*, ***Armstrong***, 2005 WI 119, ¶161. However, the "reasonable probability of a different result" prong is not subject to the clear and convincing evidence burden. ***Id.***, ¶¶160-62.

The circuit court's role in assessing credibility for purposes of the "reasonable probability" prong is defined and limited by the nature of the relevant inquiry. Again, "[a] reasonable probability of a different result exists if 'there is a reasonable probability that *a jury*, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Love***, 2005 WI 116, ¶44 (emphasis added; citation omitted). As explained in ***McCallum***, evidence that is incredible would not raise a reasonable doubt and thus would not create a reasonable probability of a different result. 208 Wis.2d at 475.

This credibility assessment, however, must account for both the "reasonable probability" standard and the relative roles of the court and the jury. As noted *supra*, reasonable probability does not require a finding that the newly discovered evidence *would* more likely than not cause an acquittal or a better result for the defendant. There need only be a reasonable probability of such a result. *E.g.*, ***Kyles***, 514 U.S. at 434-35.

Moreover, the focus of the test is on how a reasonable *jury* could view the evidence, not how the particular judge ruling on the motion might view it. ***Love***, 2005 WI 116, ¶44; ***McCallum***, 208 Wis.2d at 468, 474. The court therefore cannot reject the testimony of new witnesses merely because it may choose to disbelieve them or because it may find the trial testimony more believable. *E.g.*, ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. Concurring). Rather, the only question for the Court is whether witness testimony creating a reasonable probability of a different result *could* be credited by a reasonable jury sufficient to create a reasonable doubt. *Cf.*, ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752 (1990) (inferences to be drawn from evidence must be left to trier of fact unless the evidence is incredible as a matter of law).

In other words, the court's credibility assessment of the new evidence for deciding whether it creates a reasonable probability of a different result is limited to deciding whether the evidence is incredible as a matter of law.[5] *See, e.g.*, ***State v. Brown***, 96 Wis.2d 238, 247, 291 N.W.2d 528 (1980) ("Unless a witness's testimony is deemed incredible as a matter of law, the credibility of the witness is irrelevant in the trial court's determination of whether the proffered third-party statement should be admitted." (footnote omitted)). If it is not, then the court may not substitute its credibility findings for that of a jury. *Cf.* ***Poellinger***, *supra*; ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25 (1980) ("Testimony is incredible only when it is 'in

[5] The question of whether the new evidence is sufficiently credible is separate from the substantive question of whether the evidence, if credible, creates a reasonable probability of a different result. *See, e.g.*, ***State v. Avery***, 2013 WI 13, ¶ 36, 345 Wis.2d 407, 826 N.W.2d 60 (Although credible, newly discovered photogrammetry evidence insufficient to create reasonable probability of a different result).

conflict with the uniform course of nature or with fully established or conceded facts.'"); ***Taylor v. State***, 55 Wis.2d 168, 180–81, 197 N.W.2d 805 (1972) ("It is only where the evidence on which the trier of fact has relied can be held incredible as a matter of law that this court will overturn a jury determination.").

The Court has used various language to describe this level of credibility - "worthy of belief," "indicia of reliability," "within the realm of believability," "a jury could believe the evidence," *see, e.g.*, ***Kivioja***, 225 Wis.2d at 295-96; ***McCallum***, 208 Wis.2d at 487 (Abrahamson, C.J., concurring) - but the assessment of whether a reasonable jury could find particular evidence sufficiently credible to rely on it necessarily boils down to whether the evidence is incredible as a matter of law, *e.g.*, ***Kivioja***, 225 Wis.2d at 297-98; ***State v. Vollbrecht***, 2012 WI App 90, ¶28 n.18, 344 Wis.2d 69, 820 N.W.2d 443.

So long as the evidence is not incredible as a matter of law, i.e., "in conflict with ... nature or with fully established or conceded facts," ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567 (1974), it is the jury that must resolve credibility disputes, not the court. ***Id.***; *see* ***Jenkins***, 2014 WI 59, ¶64; ***Poellinger***, 153 Wis.2d at 506.

Arguments that evidence is not credible because it is inconsistent, or subject to impeachment for bias or the like consistently are rejected on the grounds that the jury must be left to decide such issues so long as the evidence is not incredible as a matter of law. *E.g.*, ***In re Commitment of Curiel***, 227 Wis.2d 389, 421, 597 N.W.2d 697 (1999) (conflicting testimony does not render evidence incredible as a matter of law); ***Poellinger***, 153 Wis.2d at 506-07; ***Haskins*** 97 Wis.2d at 425 ("The inconsistencies and contradictions in the testimony of Garner and Nash do not render the testimony inherently or patently incredible, but

simply created a question of credibility for the jury, and not this court, to resolve"); ***State v. Clark***, 87 Wis.2d 804, 816, 275 N.W.2d 715 (1979) (witness's inability to remember and impeachment by gynecologist "affect [the witness's] credibility but do not make her testimony incredible as a matter of law. Generally, testimony must be in conflict with nature or fully established or conceded facts to be so "'inherently or patently incredible'" that this court will substitute its judgment for that of the jury"); ***Ruiz,*** 75 Wis.2d at 232 ("Even though there be glaring discrepancies in the testimony of a witness at trial, or between his trial testimony and his previous statements, ... that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible."). *See also* ***id.*** at 235 ("It is only where 'no finder of fact could believe the testimony' that we would be impelled to conclude that it was incredible as a matter of law." (citation omitted)).

This Court consistently has refused to substitute judicial credibility findings of the type below for those of a jury unless the evidence is "in conflict with . . . nature or with fully established or conceded facts" when assessing whether evidence is sufficient to satisfy a "reasonable probability of a different result" standard on an ineffectiveness claim, ***Jenkins***, 2014 WI 59, ¶¶50-65, a "much more likely than not" standard, ***Curiel***, 227 Wis.2d at 419, or even the "proof beyond a reasonable doubt" standard for conviction, *e.g.*, ***Rohl***, *supra*.

The only exception appears to be ***Kivioja***, *supra*. The Court there substituted a "worthy of belief/not incredible as a matter of law" standard on motions seeking plea withdrawal on "fair and just reason" grounds before sentencing based on newly discovered recantations for ***McCallum's*** "corroboration and reasonable probability of a different result" standard applicable to post-sentencing motions under the "manifest injustice"

standard.

While identification of that less-restrictive standard makes sense, the Court's application of that standard in ***Kivioja*** conflicts with every other application of the "incredible as a matter of law" standard. Indeed, ***Kivioja*** did not even recite the controlling "in conflict with ... nature or with fully established or conceded facts" standard for finding evidence to be incredible as a matter of law. Rather, it applied an *ad hoc* credibility assessment based on factors developed for use when assessing whether exculpatory but otherwise inadmissible hearsay is nonetheless sufficiently reliable to mandate admission as a matter of due process. ***Kivioja***, 225 Wis.2d 271, ¶¶55, 59-66 (citing ***Brown***, 96 Wis.2d at 243-45). While a "reasonable probability of a different result" merely requires that the new evidence not be "incredible as a matter of law," the standard from which ***Kivioja*** adopted its credibility factors requires "'considerable assurance' . . . of the trustworthiness of a third party confession." ***Brown***, 96 Wis.2d at 243, 245.

That analysis, as applied by the ***Kivioja*** Court, cited nothing about the particular recantation there that was in "conflict with ... nature or with fully established or conceded facts." Rather, it employed exactly the considerations that the Court has otherwise consistently rejected for purposes of assessing whether evidence is incredible as a matter of law, on the one hand, or worthy of belief, on the other. *E.g.*, ***Curiel***, *supra*. Specifically, in deeming the recantation "incredible," the Court cited the witness' possible motive to falsely recant, the absence of corroboration for the recantation, and the witness' prior inconsistent statements. 225 Wis.2d 271, ¶¶60-64.

Moreover, the ***Kivioja*** Court deemed the sanctity of the oath as insufficient to render the recantation worthy of belief. 225 Wis.2d 271, ¶65. This again conflicts with every other

application of the "worthy of belief/incredible as a matter of law" standard. Indeed, it conflicts with the very case it relied upon for its "worthy of belief" factors. As this Court held in ***Brown***:

> The testimony of the in-court witness who repeats the out-of-court declaration possesses the conventional indicia of reliability: The testimony is given under oath, impressing the speaker with the solemnity of his statements; the witness's word is subject to cross-examination; and his presence permits his demeanor and credibility to be assessed by the jury. Exclusion of the witness's testimony (and the hearsay statement) because of the trial court's doubts as to the witness's credibility constitutes a judicial assumption of the jury's function. Unless a witness's testimony is deemed incredible as a matter of law, the credibility of the witness is irrelevant in the trial court's determination of whether the proffered third-party statement should be admitted.

96 Wis.2d at 247 (footnote omitted).

Consistency and logic dictate that a criminal defendant raising newly discovered evidence under a "reasonable probability of a different result" standard not be held to a more restrictive interpretation of "worthy of belief" than is the state attempting to prove its case under a "beyond a reasonable doubt" or "much more likely than not" standard. If evidence is sufficiently credible to convict a man and send him to prison so long as it does not "conflict with ... nature or with fully established or conceded facts," ***Rohl***, 65 Wis.2d at 695, then it necessarily is credible enough to justify a new trial. *See* ***Green v. Georgia***, 442 U.S. 95, 97 (1979) (type of evidence that the state deems reliable enough to base a conviction and death sentence on is reliable enough to support defense); ***Brown***, 96 Wis.2d at 245 (citing ***Green*** for same proposition).

ii. The circuit court exceeded its role in assessing credibility of the new evidence

As the prior section makes clear, the circuit court's role in assessing the credibility of newly discovered evidence – including newly discovered recantations – is limited to determining whether either the recantation itself or, if the recantation is recounted by a third party, that third party's testimony is incredible as a matter of law, i.e., in "conflict with ... nature or with fully established or conceded facts." ***Rohl***, 65 Wis.2d at 695. The circuit court did not limit itself to that role, instead arrogating to itself the jury's role of assessing credibility.

On a factual level, the circuit court's written order (drafted by the prosecutor (R76:30; App. 21)) stated not that the new witnesses were incredible, but that they "have limited credibility." (R52; App. 8). As this Court held in ***McCallum***, 208 Wis.2d at 474, however, the proper standard is not whether the trial court believes the recantation to be more or less credible than the original testimony but "whether there is a reasonable probability that a jury, looking at both the [former testimony] and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 474 (emphasis added). "Less credible is far from incredible." ***Id.*** at 475.

In its oral comments, the circuit court only directly addressed the credibility of one new affidavit, concluding that it is "inherently not believable" because the affiant admitted to helping a state's witness to concoct and prepare his false testimony. (R76:29; App. 20). However, as this Court held in ***Brown***, the credibility of testifying witnesses is to be determined by the jury unless that testimony is incredible as a matter of law. 96 Wis.2d at 247. Nothing about that witness' affidavit, or *any* of the new witnesses' affidavits, is in "conflict with ... nature or

with fully established or conceded facts." Moreover, the circuit court's suggestion is wholly unrealistic and unreasonable because, if admitting to misconduct rendered testimony "inherently not believable," then the state's witnesses necessarily were inherently incredible as well since they likewise admitted to crimes. The state cannot simultaneously deem "incredible" that which it deems reliable enough to justify conviction. ***Green***, *supra*.

Even if the unique and misplaced ***Kivioja*** credibility analysis were deemed to apply here, McAlister's motion and witnesses satisfy it. The witnesses are available to testify to Jefferson's and Waters' recantations under oath. ***Brown***, 96 Wis.2d at 247. The witnesses' statements and the recantations they recite corroborate each other. ***Chambers***, 410 U.S. at 300. And, unlike the state's trial witnesses, McAlister's witnesses here have no motive to lie, and there is no indication that any of McAlister's witnesses have made inconsistent statements regarding the recantations. Accordingly, there is no reason to believe that either the recantations or the witnesses to them are so unworthy of belief that a reasonable jury could not possibly find them sufficiently credible to create a reasonable doubt as to McAlister's guilt.

c. Assuming that the witnesses to Jefferson's and Waters' admissions are not incredible as a matter of law, McAlister has shown a reasonable probability of a different result

Beyond arguing that Jefferson's and Waters' admissions that they were framing McAlister for robberies he did not commit were uncorroborated recantations and that the witnesses to those recantations were insufficiently credible, the state has not disputed that the substance of the admissions creates a reasonable probability of a different result. As the trial

prosecutor emphasized in closing, in language the circuit court deemed compelling enough to quote at the post-conviction status hearing (R76:20-21; App. 16-17):

> . . . And really what it all boils down to, more than anything else, is do you believe Anthony Waters (sic) and/or Nathan Jefferson or don't you?
>
> . . . If you believe them, either/or, you'll find the defendant guilty; and quite frankly, if you don't believe what they told you, there is no way to find the defendant guilty.
>
> There is not enough other evidence of his involvement to find him guilty of these crimes if you don't believe them when they say he was involved.

(R73:59-60; *see id.*:69; *see also* R70:95 (state's opening).

Under these circumstances, evidence of pretrial admissions by the state's witnesses that McAlister was not involved in the robberies and that they were nonetheless framing him to mitigate the consequences of their own misconduct cannot help but create a reasonable probability of a different result.

* * *

Because the allegations of McAlister's motion, if true, entitle him to the new trial he seeks, the circuit court erred in denying him an evidentiary hearing on that motion. That court misconstrued and misapplied controlling authority and arrogated to itself the credibility determinations properly due to a jury on retrial. The Court of Appeals' decision affirming the denial of that motion accordingly must be reversed and the case remanded for the evidentiary hearing to which McAlister is entitled.

CONCLUSION

For these reasons, McAlister asks that the Court reverse the decisions below and remand for an evidentiary hearing on McAlister's newly discovered evidence claim.

Dated at Milwaukee, Wisconsin, October 18, 2017.

Respectfully submitted,

DAVID MCALISTER, SR.,
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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,214 words.

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Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 18th day of October, 2017, I caused 10 copies of the Brief and Appendix of Defendant-Appellant-Petitioner David McAlister, Sr., to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak

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