STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2014AP2561

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 DENYING A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE EMILY S. MUELLER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

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The circuit court did not address this issue.

The court of appeals did not address this issue.

This Court should answer "no."

2. Does McAlister's new evidence create a reasonable probability of a different result at trial?

The circuit court answered "no."

The court of appeals did not address this issue.

This Court should answer "no."

3. Did McAlister meet the corroboration requirement for an admission of perjury?

The circuit court answered "no."

The court of appeals did not address this issue.

This Court should answer "no."

4. Should this Court eliminate the longstanding rule that newly discovered "mere impeachment" evidence does not justify a new trial?

The circuit court did not address this issue.

The court of appeals did not address this issue.

This Court should not address this issue in this case, but if it chooses to do so, it should answer "no."

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests oral argument and publication.

INTRODUCTION

A jury found David McAlister, Sr., guilty of participating in two armed robberies with Alphonso Waters and Nathan Jefferson. Waters and Jefferson provided much of the trial evidence linking McAlister to the crimes. McAlister had a direct appeal and lost. Then, seven years after his trial, he filed a postconviction motion under Wis. Stat. § 974.06, claiming to have newly discovered evidence and submitting affidavits from three inmates to support his motion. The inmates claimed that they were in prison or jail with Waters and Jefferson in 2006 and that Waters and Jefferson had said that they were going to falsely testify against McAlister at his trial. One of the inmates, for example, claimed that Jefferson had told him in jail about the conspiracy to frame McAlister and then, seven years later, that inmate coincidentally happened to overhear McAlister complain about being framed by Jefferson and Waters. The other two inmates—who are serving life sentences—did not even bother to explain in their affidavits how they came to share their knowledge with McAlister.

This Court should affirm the circuit court's denial of McAlister's postconviction motion for three reasons. First, McAlister's newly discovered evidence claim is not cognizable under Wis. Stat. § 974.06 because it is not a constitutional or jurisdictional claim. Claims of actual innocence based on newly discovered evidence are not constitutional claims. *See Herrera v. Collins*, 506 U.S. 390, 400–01 (1993). Second, the circuit court found McAlister's new evidence "inherently not believable." That factual finding is well supported by the record and means that McAlister's claim has no merit. Third, McAlister's new evidence is a form of recantation and therefore is subject to a corroboration requirement, which McAlister has failed.

STATEMENT OF THE CASE

Nathan Jefferson and McAlister's niece attempted an armed robbery at a credit union in Racine in December 2004. (R. 72:21–27.) Jefferson, McAlister's niece, and Alphonso Waters committed an armed robbery at an auto title loan store in Racine later that month. (R. 71:45–51; 72:30–36.) Police arrested Jefferson and Waters in March 2005 for armed robberies unrelated to the ones in December. (R. 1:4.) Jefferson told police that McAlister had planned the two December robberies, served as the getaway driver, and provided the guns used at the credit union. (R. 1:4–5.) Waters similarly told police that McAlister had planned the robbery at the title loan store and served as the getaway driver. (R. 1:5.)

The State charged McAlister with attempted armed robbery as a party to the crime, armed robbery as a party to the crime, and possession of a firearm by a felon. (R. 2:2.)

McAlister had a jury trial in January 2007. (R. 70–74.) Waters and Jefferson testified against McAlister. (R. 71:43–51; 72:20–36.) The jury found McAlister guilty of the three charges mentioned above. (R. 73:103.)

The circuit court imposed sentences on McAlister effectively totaling 25 years of initial confinement and nine years of extended supervision. (R. 74:16.) The court relied heavily on McAlister's history of robberies and possessing firearms as a felon. (R. 74:13–15.) It noted that McAlister's criminal record had "robbery after robbery after robbery after robbery, most of them committed while [he was] out on supervision for some sort of prior robbery." (R. 74:15.)

McAlister filed a motion for a new trial. (R. 38; 39.) The circuit court denied the motion. (R. 40.) The court of appeals affirmed. (R. 42.) McAlister filed a petition for review, which this Court denied in January 2010. (R. 43.)

McAlister filed a motion for postconviction relief under Wis. Stat. § 974.06 in May 2014, claiming that he had newly discovered evidence. (R. 46.) He submitted three affidavits in support of his motion. (R. 47; 48.)

The first affidavit was by Wendell McPherson, who claimed the following. McPherson was in prison with Alphonso Waters in March 2006 before Waters testified at McAlister's trial. (R. 47:1–4.) Waters 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. (R. 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." (R. 47:2.) When McPherson asked why Waters was going to lie about McAlister's part in the robberies, Waters said that "[h]e didn't like Mr. McAlister and he wanted to get Mr. McAlister out of the picture." (R. 47:3.) Waters also said that he had written "a letter" to Jefferson telling him "exactly what to say because he had made a plea deal and he want they statements to collaborate so Mr. Jefferson can get a plea deal." (R. 47:3.) McPherson helped Waters prepare for McAlister's trial by helping Waters "rehearse[] the lies that he testified to so he would be believable." (R. 47:3.) McPherson did not explain in his affidavit how he was able to share his knowledge with McAlister.

The second affidavit was by Corey Prince, who made the following claims. (R. 47:5.) Prince was in the Racine County Jail with Nathan Jefferson in 2006 and 2007 before Jefferson testified at McAlister's trial. (R. 47:5.) During that time, Jefferson told Prince that Alphonso Waters, who was also known as "Bird," had instructed Jefferson 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." (R. 47:5.) Several years later, in 2012, Prince was in Waupun Correctional Institution with McAlister when he overheard McAlister complain that "Nate" and "Bird" had set him up by lying and implicating him in robberies they had committed. (R. 47:5.) Prince then introduced himself to McAlister and explained the conversation he had had with Jefferson back in 2006 or 2007. (R. 47:5.)

The third affidavit was by Antonio Shannon, who made the following claims. (R. 48.) Shannon and his friend "Amanda" had witnessed a man running away from an auto title loan store in December 2004 and then heard police sirens. (R. 48:1.) The running man's head was "covered by his hood." (R. 48:1.) Shannon met Nathan Jefferson in 2006 in the Racine County Jail. (R. 48:1.) They learned that "Amanda" was a mutual friend, and Jefferson then told Shannon that he had robbed the title loan store two years earlier. (R. 48:1.) Shannon recalled that Jefferson was the robber he had seen fleeing two years earlier, although he did not know Jefferson at the time of the robbery. (R. 48:1.) Jefferson said "that he had an 'out,'" but it would work only "if 'Bird' said the same thing." (R. 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." (R. 48:2.) Shannon did not explain in his affidavit how he was able to share his knowledge with McAlister.

The circuit court held a non-evidentiary hearing on McAlister's postconviction motion and ultimately denied it. (R. 76.)[1] The court found that McAlister's new evidence was "inherently not believable" and did not show "a reasonable probability that a different result would be reached at [a new] trial." (R. 76:29, 30.) The court also determined that the new

[1] The same judge—the Honorable Emily S. Mueller—presided over McAlister's trial and rejected his claim of newly discovered evidence. (R. 70–73; 76.)

evidence constituted recantations, lacked new evidence of a motive to falsely accuse McAlister, and lacked corroboration. (R. 76:29.) In a written order, the court explained that "the witnesses proposed by the defendant have limited credibility," "there is no circumstantial guarantee of trustworthiness of the recantation," and "the defendant has failed to show that the 'feasible motive' required was newly discovered." (R. 52.)

The court of appeals affirmed on alternative grounds. It determined that McAlister's new evidence was mere impeachment evidence and "cumulative" with evidence from his trial. (McAlister Br. App. 5.) McAlister moved for reconsideration. The court of appeals denied the motion. (*Id.* at 6.) Judge Brian Hagedorn concurred and argued that the court's "mere impeachment" rationale was wrong. (*Id.* at 7.) Judge Hagedorn argued that the circuit court had properly denied McAlister's motion for a new trial because it had reasonably found his new evidence "inherently unbelievable." (*Id.*)

McAlister filed a petition for review, which this Court granted.

SUMMARY OF ARGUMENT

I. McAlister's claim is not cognizable under Wis. Stat. § 974.06. That statute is limited to constitutional or jurisdictional claims. *State v. Balliette*, 2011 WI 79, ¶ 34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334. But a newly discovered evidence claim is neither of those things. The Supreme Court has held that claims of actual innocence based on newly discovered evidence are not constitutional claims. *Herrera v. Collins*, 506 U.S. 390, 400–01 (1993). And there is no constitutional right to raise such a claim at any time. *Id.* at 410–11.

Further, federal courts have held that such claims are not cognizable under the federal analogue to section 974.06 because they are not constitutional claims. *E.g., United States v. Evans*, 224 F.3d 670, 673–74 (7th Cir. 2000). This Court should overrule contrary precedent because it is unsound in principle and detrimental to coherence and consistency in the law.

II. McAlister's new evidence does not create a reasonable probability of a different result at trial.

II.A. This Court should clarify that the misuse-of-discretion standard of review applies to the "reasonable probability" requirement of the newly discovered evidence test. This Court has stated that this issue gets reviewed deferentially, but it has said in other cases that review is *de novo*. The correct standard is that an appellate court reviews *de novo* whether a circuit court applied correct legal principles, but it reviews the circuit court's application of those principles for a misuse of discretion. A deferential standard of review is appropriate because the circuit court is in the best position to determine whether new evidence would probably produce a different result. *State v. McCallum*, 208 Wis. 2d 463, 475, 561 N.W.2d 707 (1997). Credibility determinations, which a circuit court is in the best position to make, are crucial to that determination. *Id.*

II.B. McAlister's claim fails the "reasonable probability" requirement, even under *de novo* review, because his new evidence is patently incredible. His new evidence consists of affidavits by three inmates, two of whom have "nothing to lose" because they are serving life sentences. *See Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007). Only one inmate bothered to explain how he was able to provide an affidavit to McAlister, and the explanation is unbelievable. All three inmates wrote their affidavits about six or seven years after McAlister's trial but failed to explain

why they did not come forward much sooner. *See Herrera*, 506 U.S. at 417–18. And the "affidavits are particularly suspect" because "they consist of hearsay." *See id.* at 417.

III. McAlister's new evidence lacks corroboration.

III.A. When newly discovered evidence is a recantation, a defendant must corroborate it with other newly discovered evidence. *McCallum*, 208 Wis. 2d at 476. This Court should hold that the corroboration requirement applies equally where, as here, a witness allegedly admitted that he would commit perjury in the future. Corroboration is required because an admission of perjury is inherently unreliable. *Id.* An admission to past or future perjury is inherently unreliable.

III.B. McAlister's new evidence fails the corroboration requirement. McAlister must show that the affidavits have circumstantial guarantees of trustworthiness, but he has failed to do so. Waters and Jefferson did not admit *under oath* that they were going to frame McAlister. McAlister did not provide affidavits by Waters and Jefferson but instead offered hearsay accounts of statements that they had allegedly made. There is no indication that Waters and Jefferson knew when they allegedly admitted to perjury that they would face criminal consequences for lying at trial. The fact that McAlister's three affiants waited about six or seven years to come forward—with no explanation for the delay—further shows that the affidavits are untrustworthy. Additionally, the affidavits do not corroborate each other. The affidavits' allegations of perjury are inherently unreliable, so the affidavits cannot corroborate each other without circumstantial guarantees of trustworthiness. *See State v. Ferguson*, 2014 WI App 48, ¶ 31, 354 Wis. 2d 253, 847 N.W.2d 900.

IV. While this case does not implicate the issue, this Court should reject McAlister's request that it abandon the rule that a new trial is not justified based on newly discovered evidence that merely tends to impeach the credibility of a witness. McAlister contends that this rule conflicts with case law holding that new impeachment evidence can require a new trial. There is no conflict in the case law. New impeachment evidence will *rarely* justify granting a new trial. When it does, it is not *mere* impeachment evidence. Other courts have recognized this distinction.

STANDARD OF REVIEW

"The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion." *State v. Avery*, 2013 WI 13, ¶ 22, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). An appellate court will affirm the decision "if it has a reasonable basis and was made in accordance with accepted legal standards and facts of record." *State v. Carnemolla*, 229 Wis. 2d 648, 656, 600 N.W.2d 236 (Ct. App. 1999) (citation omitted).

ARGUMENT

I. McAlister's actual innocence claim is not cognizable under Wis. Stat. § 974.06.

A defendant may collaterally attack a conviction under Wis. Stat. § 974.06(1) by arguing "that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." *Id.* "[A] defendant may raise only constitutional or jurisdictional issues in a Wis. Stat. § 974.06 motion." *State v. Balliette*, 2011 WI 79, ¶ 34 n.4, 336 Wis. 2d 358, 805 N.W.2d 334 (citation omitted). Claims of newly

discovered evidence like McAlister's—claims that new evidence suggests that the defendant is innocent—are neither jurisdictional nor constitutional claims. This Court should thus hold that McAlister's claim is not cognizable under section 974.06.[2]

Claims of actual innocence based on newly discovered evidence do not fall into any of the permissible categories under Wis. Stat. § 974.06. Such a claim does not allege that a circuit court "was without jurisdiction to impose [a] sentence,

[2] The State may raise this cognizability argument even though it was not raised in the petition for review or the response. An issue in a petition for review includes "every subsidiary issue." Wis. Stat. § (Rule) 809.62(2)(a). The second issue in McAlister's petition was "[w]hether the allegations of McAlister's §974.06 motion were sufficient to require a new trial and therefore an evidentiary hearing on his claim." (McAlister Pet. 2.) The cognizability of his claim under that statute is a subsidiary issue of the second issue presented. Further, "the issues before the court are the issues presented in the petition for review and not discrete arguments that may be made, pro or con, in the disposition of an issue either by counsel or by the court." *State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991) (footnote omitted). "Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this court." *Id.* at 791. Thus, the State may raise its cognizability argument in response to McAlister's second issue presented. In any event, this Court may exercise its discretion to review an issue not raised in the petition or response. *See, e.g.*, *State v. Denny*, 2017 WI 17, ¶ 63 n.15, 373 Wis. 2d 390, 891 N.W.2d 144.

or that the sentence was in excess of the maximum authorized by law." *See* Wis. Stat. § 974.06(1). McAlister does not argue otherwise.[3]

The issue here is thus whether newly discovered evidence claims are constitutional claims. This Court should hold, consistent with the United States Supreme Court's case law, that they are not.

A claim of actual innocence based on newly discovered evidence is not a due process claim, as this Court and the court of appeals have recognized. *See State v. Plude*, 2008 WI 58, ¶ 38, 310 Wis. 2d 28, 750 N.W.2d 42; *State v. Brunton*, 203 Wis. 2d 195, 202 n.5, 552 N.W.2d 452 (Ct. App. 1996). A criminal defendant has a due process right to a "fundamentally fair" trial. *State v. Marinez*, 2010 WI App 34, ¶ 21, 324 Wis. 2d 282, 781 N.W.2d 511 (citation omitted). A claim of actual innocence based on newly discovered evidence does not allege that a trial was fundamentally unfair. Such a claim alleges only that the trial "reached the wrong result," "not that the trial judge committed reversible error." *Guinan v. United States*, 6 F.3d 468, 470 (7th Cir. 1993), *abrogated on other grounds by Massaro v. United States*, 538 U.S. 500 (2003); *see also Brunton*, 203 Wis. 2d at 206 ("A motion for a new trial based on newly-discovered evidence does not claim that there were errors in the conduct of the trial or deficiency

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[3] Newly discovered evidence claims also do not render a sentence "otherwise subject to collateral attack." *See* Wis. Stat. § 974.06(1). McAlister does not argue otherwise. This Court, possibly relying on that statutory language, has sometimes stated that "sec. 974.06 is applicable only to jurisdictional or constitutional matters or to *errors that go directly to the issue of the defendant's guilt*." *Cresci v. State*, 89 Wis. 2d 495, 505, 278 N.W.2d 850 (1979) (footnote omitted) (emphasis added) (citing *Smith v. State*, 85 Wis. 2d 650, 661, 271 N.W.2d 20 (1978)). That italicized language does not help McAlister because, as explained next, a newly discovered evidence claim does not allege that *an error* led to a conviction.

in trial counsel's performance."). This kind of claim is thus not a constitutional due process claim.

Consistent with the above-described principles, the United States Supreme Court has held that newly discovered evidence claims are not constitutional in nature. *Herrera v. Collins*, 506 U.S. 390, 400–01 (1993). Such claims seek to "correct errors of fact" and do not argue that defendants are "imprisoned in violation of the Constitution." *Id.* at 400 (citations omitted); *see also id.* at 404 (noting that "a claim of 'actual innocence' is not itself a constitutional claim"). The *Herrera* Court further held that Texas law did not violate due process by allowing a defendant to raise a newly discovered evidence claim only within 60 days after a judgment of conviction is filed. *Herrera*, 506 U.S. at 410–11. The Court relied on the historical unavailability of motions for new trials based on newly discovered evidence long after conviction, diverging practices among the states, the possibility of executive clemency, and the lack of any mention of new trials in the Constitution. *Id.* at 407–17. So, under *Herrera*, "[a]n argument of actual innocence, based on newly discovered evidence, does not implicate the Constitution[.]" *Ruth v. United States*, 266 F.3d 658, 661 (7th Cir. 2001) (citing *Herrera*, 506. U.S. at 400–01); *see also, e.g.*, *United States v. Evans*, 224 F.3d 670, 674 (7th Cir. 2000) (citing *Guinan*, 6 F.3d at 470–71) ("We know from [*Herrera*] that a conviction does not violate the Constitution (or become otherwise subject to collateral attack) just because newly discovered evidence implies that the defendant is innocent.").

That actual innocence claims are not cognizable under Wis. Stat. § 974.06 also flows from case law interpreting a federal habeas statute, 28 U.S.C. § 2255. Section 974.06 has "language 'taken directly from 28 U.S.C. § 2255.'" *State v. Lo*, 2003 WI 107, ¶ 21, 264 Wis. 2d 1, 665 N.W.2d 756. Indeed, § 2255(a) and section 974.06(1) are almost verbatim. With the

exception of a procedural bar in section 974.06(4), that state statute "is a direct adaptation of 28 U.S.C. sec. 2255." *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 176, 517 N.W.2d 157 (1994). Wisconsin courts thus look to federal cases on § 2255 for guidance when interpreting section 974.06. *See, e.g.*, *Beamon v. State*, 93 Wis. 2d 215, 221, 286 N.W.2d 592 (1980); *State v. Mentzel*, 218 Wis. 2d 734, 743–44, 581 N.W.2d 581 (Ct. App. 1998). Federal courts have held that "[a] *bona fide* motion for a new trial on the basis of newly discovered evidence falls outside [§ 2255(a)] because it does not contend that the conviction or sentence violates the Constitution or any statute." *Evans*, 224 F.3d at 673–74. The same is true of section 974.06.

Consistent with the above-described authorities, this Court in *Vara v. State*, 56 Wis. 2d 390, 392, 202 N.W.2d 10 (1972), held that a defendant's newly discovered evidence claim was *not* cognizable under Wis. Stat. § 974.06.

Both the court of appeals, *see State v. Bembenek*, 140 Wis. 2d 248, 252, 409 N.W.2d 432 (Ct. App. 1987), and this Court in a footnote, *see State v. Love*, 2005 WI 116, ¶ 43 n.18, 284 Wis. 2d 111, 700 N.W.2d 62, have since implicitly overruled *Vara* and held that actual innocence claims could be brought under Wis. Stat. § 974.06. As this Court explained, in its view, "[i]t would be illogical to close the court's doors to a defendant who has newly discovered evidence, evidence that by definition creates a reasonable probability that a different verdict would be reached at a new trial." *Love*, 284 Wis. 2d 111, ¶ 43 n.18. Due process "ensure[d] that a defendant at least have access to the courts and an opportunity to be heard where newly discovered evidence creates a reasonable probability that a different result would be reached at a new trial, as long as the newly discovered evidence meets [other requirements]." *Id.*

This Court should overrule the holding in *Love* and *Bembenek* that a newly discovered evidence claim is a matter of due process and cognizable under Wis. Stat. § 974.06. Although stare decisis is the preferred course of action, "[t]his court is more likely to overturn a prior decision" if it is "unsound in principle" or "detrimental to coherence and consistency in the law." *State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted). These standards are satisfied here for three reasons.

First, the due process holding in *Love* and *Bembenek* is wrong on the merits for the reasons described above. An innocence claim based on newly discovered evidence alleges only that a jury reached the wrong result. It does not allege that an error caused a trial to be fundamentally unfair in violation of due process.

Second, *Love* and *Bembenek* conflict with the Supreme Court's holding on a similar question in *Herrera*. The *Love* court mischaracterized *Herrera* as simply holding "that a death-row defendant's claim of actual innocence based on newly discovered evidence by itself does not state a basis for federal habeas corpus relief." *Love*, 284 Wis. 2d 111, ¶ 43 n.18. But *Herrera*'s holding was not just about habeas corpus. It was also about the Constitution. A newly discovered evidence claim is not cognizable in habeas corpus precisely *because* it is not a constitutional claim. *Herrera*, 506 U.S. at 400–01. It is cognizable in habeas corpus only if there was an "independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. In further conflict with *Herrera*, the *Bembenek* and *Love* courts thought that due process required allowing a defendant to raise a newly discovered evidence claim at any time. The Supreme Court squarely rejected that proposition in *Herrera*. *Id.* at 410–11.

Love did not rely on the Wisconsin Constitution to justify its departure from *Herrera*—and for good reason. "This court has repeatedly stated that the due process clauses of the state and federal constitutions are essentially equivalent and are subject to identical interpretation." *State v. Harris*, 2004 WI 64, ¶ 2 n.1, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted).

Third, the *Love* court was wrong to worry that a "court's doors" would be closed to a defendant with newly discovered evidence if it overruled the due process holding in *Bembenek*. *See Love*, 284 Wis. 2d 111, ¶ 43 n.18. Such a defendant could file a postconviction motion "within 60 days after the later of the service of the transcript or circuit court case record." Wis. Stat. § 809.30(2)(h); *see also Brunton*, 203 Wis. 2d at 200 (noting the parties' agreement "that a criminal defendant may bring a motion under Rule 809.30(2)(h), Stats., for a new trial based on newly-discovered evidence"). Otherwise the defendant could raise a newly discovered evidence claim "at any time within one year after verdict." Wis. Stat. § 805.16(4); *see also id.* §§ 805.15(3), 806.07(1)(b).[4] And a defendant could seek relief under section 974.06 if he had newly discovered evidence *of a constitutional violation*. For example, a defendant might discover after trial that the prosecution knowingly withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Plude*, 310 Wis. 2d 28, ¶ 38 n.13 (noting that new evidence of a *Brady* violation is a constitutional claim); *see also United States v. O'Malley*, 833 F.3d 810, 813–16 (7th Cir. 2016) (same). A defendant could

[4] A circuit court may not grant relief to a criminal defendant in the interest of justice under Wis. Stat. § 805.15(1) or under the "catch-all provisions in § 806.07(1)(g) and (h)." *State v. Henley*, 2010 WI 97, ¶¶ 66, 71, 328 Wis. 2d 544, 787 N.W.2d 350. But section 805.15(3), which allows a new trial based on newly discovered evidence, applies in criminal cases. *See State v. Brunton*, 203 Wis. 2d 195, 200 & n.3, 552 N.W.2d 452 (Ct. App. 1996).

also seek relief under a statute that applies to newly discovered DNA evidence. *See* Wis. Stat. § 974.07(10); *State v. Denny*, 2017 WI 17, ¶¶ 55–56, 373 Wis. 2d 390, 891 N.W.2d 144.

If all else fails, a defendant could seek relief in the interest of justice despite any limitations in section 974.06. *See State v. Armstrong*, 2005 WI 119, ¶¶ 110–14, 283 Wis. 2d 639, 700 N.W.2d 98. This Court and the court of appeals may reverse for a new trial in the interest of justice if the real controversy was not fully tried or if justice has probably miscarried. *Avery*, 345 Wis. 2d 407, ¶ 38 & nn.17–18. Newly discovered evidence may require a new trial in the interest of justice. *State v. Maloney*, 2006 WI 15, ¶¶ 14 n.4, 40 & nn.16–17, 288 Wis. 2d 551, 709 N.W.2d 436. However, "[r]eversals in the interest of justice should be granted only in *exceptional* cases." *State v. McKellips*, 2016 WI 51, ¶ 30, 369 Wis. 2d 437, 881 N.W.2d 258 (citation omitted).

In short, a newly discovered evidence claim is not cognizable under section 974.06.

This Court should decline to consider the merits of McAlister's claim. That claim is not cognizable under section 974.06 because it does not allege a constitutional or jurisdictional error. It instead alleges only that new evidence suggests that McAlister is innocent. Courts generally do not reach the merits of non-cognizable claims brought under Wis. Stat. § 974.06. *See, e.g.*, *State v. Schlise*, 86 Wis. 2d 26, 29, 271 N.W.2d 619 (1978); *Sass v. State*, 63 Wis. 2d 92, 96–97, 216 N.W.2d 22 (1974); *State v. Langston*, 53 Wis. 2d 228, 232, 191 N.W.2d 713 (1971). Further, this Court should apply its new cognizability holding to McAlister. "Changes in the law of collateral attack constitutionally may be applied to persons who were convicted while greater opportunities for collateral review existed." *Liegakos v. Cooke*, 106 F.3d 1381, 1384 (7th Cir. 1997) (citations omitted) (upholding retroactive

application of a new procedural bar under Wis. Stat. § 974.06); *see also State v. Braun*, 185 Wis. 2d 152, 166, 516 N.W.2d 740 (1994) (retroactively applying a new procedural bar under section 974.06 to Braun); *but see State v. Smith*, 55 Wis. 2d 304, 308, 198 N.W.2d 630 (1972) (declining to retroactively apply case law limiting the types of claims that may be brought under section 974.06).

Although this Court may *sua sponte* consider whether to reverse in the interest of justice, *Maloney*, 288 Wis. 2d 551, ¶ 16, it should decline to consider that issue here. If this Court wants to consider that issue, however, it may order supplemental briefing. *See id.* ¶ 20.

II. McAlister's new evidence does not create a reasonable probability of a different result.

A. This Court should clarify that the "reasonable probability" requirement has a deferential standard of review.

A defendant must satisfy five requirements to obtain a new trial based on newly discovered evidence. To meet the first four requirements, a defendant must show by clear and convincing evidence that "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." *Avery*, 345 Wis. 2d 407, ¶ 25 (citation omitted).

If a defendant is able to establish those four factors, then a court must consider the fifth requirement, "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *Id.* (citation omitted). The party seeking relief bears

the burden of proving that a reasonable probability exists. *See Armstrong*, 283 Wis. 2d 639, ¶¶ 160–61; *State v. Williams*, 2001 WI App 155, ¶ 11, 246 Wis. 2d 722, 631 N.W.2d 623. A newly discovered evidence claim fails unless it meets all five requirements. *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996).[5]

Courts have inconsistently described the standard of review for the "reasonable probability" prong. Courts have sometimes stated that the standard of review looks at whether the circuit court properly used its discretion. *Avery*, 345 Wis. 2d 407, ¶ 32 (citing *Plude*, 310 Wis. 2d 28, ¶ 31; *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)); *State v. Edmunds*, 2008 WI App 33, ¶ 16, 308 Wis. 2d 374, 746 N.W.2d 590 (citing *McCallum*, 208 Wis. 2d at 473). On the other hand, courts have stated that the "reasonable probability" prong raises a question of law. *Plude*, 310 Wis. 2d 28, ¶ 33 (citing *McCallum*, 208 Wis. 2d at 474); *State v. Vollbrecht*, 2012 WI App 90, ¶ 18, 344 Wis. 2d 69, 820 N.W.2d 443 (citing *Plude*, 310 Wis. 2d 28, ¶ 33).

This Court should clarify that the standard of review for the "reasonable probability" prong of the newly discovered evidence test is a deferential standard that has a *de novo* aspect. An appellate court will sustain a circuit court's discretionary determination if "the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 13, 312 Wis. 2d 1, 754 N.W.2d 439 (citation omitted). But an appellate court decides *de novo* whether a

[5] The State concedes that McAlister has met the first four requirements. *See State v. Terrance J.W.*, 202 Wis. 2d 496, 501, 550 N.W.2d 445 (Ct. App. 1996) (noting that "a recantation will generally meet the first four criteria").

circuit court applied a proper legal standard, which is a question of law. *Id.*

Courts have recognized this hybrid standard of review in cases dealing with newly discovered evidence. "Although a motion for a new trial based on newly-discovered evidence is addressed to the trial court's discretion, the trial court erroneously exercises its discretion if it bases its decision on an error of law." *Brunton*, 203 Wis. 2d at 201–02 (footnote omitted) (citations omitted); *see also, e.g.*, *Plude*, 310 Wis. 2d 28, ¶ 31 (citing *McCallum*, 208 Wis. 2d at 474) ("A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence."); *McCallum*, 208 Wis. 2d at 473 (citation omitted) ("An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion."); *State v. Ferguson*, 2014 WI App 48, ¶ 29, 354 Wis. 2d 253, 847 N.W.2d 900 (noting that appellate review of a newly discovered evidence claim "boils down to whether the circuit court applied appropriate legal principles").

This Court has already found this deferential standard of review appropriate. Newly discovered evidence fails the "reasonable probability" requirement if a circuit court finds it incredible. *McCallum*, 208 Wis. 2d at 475. Because "credibility is crucial to the application of the proper legal standard," "the circuit court judge is in a much better position to resolve the question of whether the recantation would raise a reasonable doubt in the minds of a jury that is looking at both the recantation and the original statement." *Id.* at 479; *see also id.* at 488–91 (Abrahamson, C.J., concurring) (agreeing that an appellate court should review a circuit court's credibility finding for clear error and review its ruling on the "reasonable probability" prong for a misuse of discretion because the circuit court is in a better position to make those determinations). A circuit court's superior

position stems from the circuit court judge's presiding over the trial, the postconviction hearing, or both. *Id.* at 491 (Abrahamson, C.J., concurring).

Undeterred by all that precedent, McAlister argues that this Court should hold that *de novo* review applies to a circuit court's denial of a newly discovered evidence claim, including the circuit court's determination on the "reasonable probability" prong. (McAlister Br. 11–12.) Applying a deferential standard of review, according to McAlister, "causes unnecessary complexity and confusion." (*Id.* at 11.) McAlister notes that courts apply *de novo* review to "reasonable probability" determinations when reviewing constitutional claims, like *Brady* claims and ineffective assistance of counsel claims. (*Id.* at 12.) He contends that a newly discovered evidence claim is a due process claim. (*Id.* at 11.)

McAlister's arguments are unavailing. It is well-established that an appellate court reviews a circuit court's ruling on a newly discovered evidence claim for a misuse of discretion. *See, e.g.*, *Swonger v. State*, 54 Wis. 2d 468, 471, 195 N.W.2d 598 (1972) (citing *Combs v. Peters*, 23 Wis. 2d 629, 127 N.W.2d 750, 129 N.W.2d 174 (1964)). McAlister has not given a compelling reason for overturning that longstanding standard of review. To the contrary, this deferential standard of review is appropriate for the reasons stated above. Of course, a court applies *de novo* review when assessing a *constitutional claim* based on new evidence. *See Brunton*, 203 Wis. 2d at 202 n.5. But *de novo* review does not apply here because McAlister's claim is not constitutional in nature, as explained above in Argument Section I.

B. McAlister's new evidence is patently incredible.

A circuit "court is not to base its decision solely on the credibility of the newly discovered evidence, unless it finds the new evidence to be incredible." *Avery*, 345 Wis. 2d 407, ¶ 25. A circuit court may find newly discovered evidence "incredible as a matter of law." *See, e.g.*, *State v. Kivioja*, 225 Wis. 2d 271, 297–98, 592 N.W.2d 220 (1999); *Ferguson*, 354 Wis. 2d 253, ¶¶ 24, 29, 30. Such a finding means that the evidence fails the "reasonable probability" requirement. *See, e.g.*, *Ferguson*, 354 Wis. 2d 253, ¶¶ 24, 30; *McCallum*, 208 Wis. 2d at 487–88 (Abrahamson, C.J., concurring). An appellate court upholds such a finding unless the circuit court misused its discretion. *Ferguson*, 354 Wis. 2d 253, ¶¶ 27, 29; *see also Vollbrecht*, 344 Wis. 2d 69, ¶ 28 n.18 (deferring to the circuit court's finding that newly discovered evidence was not incredible as a matter of law).[6]

[6] If a circuit court finds new evidence incredible due to a witness's demeanor while testifying, that finding is upheld on appeal unless it is clearly erroneous. *See Terrance J.W.*, 202 Wis. 2d at 501. McAlister argues that when a circuit court determines the credibility of newly discovered evidence, the court is limited to determining if the new evidence is incredible as a matter of law. (McAlister Br. 29–33.) But courts have already rejected that argument. *State v. Carnemolla*, 229 Wis. 2d 648, 658–59, 600 N.W.2d 236 (Ct. App. 1999). McAlister reaches a different conclusion because he mistakenly relies on cases dealing with other areas of the law, such as sufficiency of the evidence claims or ineffective assistance of counsel claims. In any event, McAlister's argument is irrelevant because the circuit court here found his new evidence incredible as a matter of law, which the parties agree it was allowed to do.

"To be incredible as a matter of law is to be inherently or patently incredible; that is, 'in conflict with the uniform course of nature or with fully established or conceded facts.'" *Vollbrecht*, 344 Wis. 2d 69, ¶ 28 n.18 (citation omitted). "In order to conflict with nature, testimony must present 'physical improbabilities, if not impossibilities,' or be 'intrinsically improbable and almost incredible.'" *State v. Tarantino*, 157 Wis. 2d 199, 219, 458 N.W.2d 582 (Ct. App. 1990) (quoting *State v. Clark*, 87 Wis. 2d 804, 816, 275 N.W.2d 715 (1979)).

Newly discovered evidence in the form of affidavits can be incredible for a number of reasons. Such "affidavits are particularly suspect" if "they consist of hearsay." *See Herrera*, 506 U.S. at 417.[7] A court may also consider whether a person "was incarcerated at the time his affidavit was made." *See People v. Morales*, 791 N.E.2d 1122, 1132 (Ill. Ct. App. 2003). Recantations made while in jail are "highly suspicious." *See United States v. Walker*, 25 F.3d 540, 549 (7th Cir. 1994) (citation omitted); *see also Rivera v. Nolan*, 596 F. Supp. 2d 162, 170 (D. Mass. 2009) (citations omitted) (noting that a "state court could easily" disbelieve a "hearsay jailhouse statement").

Newly discovered affidavits are also "suspect" if they "arise years after the trial. The passage of years diminishes the reliability of the information that challenges the trial testimony." *Woodard v. Thaler*, 702 F. Supp. 2d 738, 754 (S.D. Tex. 2010) (citing *Herrera*, 506 U.S. at 417); *see also Murray*

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[7] Regardless of whether the factual assertions in a newly discovered affidavit are admissible evidence, a court still must consider whether they are reliable. *Kuenzel v. Allen*, 880 F. Supp. 2d 1162, 1178, 1183 n.18 (N.D. Ala. 2009) (citation omitted), *aff'd sub nom. Kuenzel v. Comm'r, Alabama Dep't of Corr.*, 690 F.3d 1311 (11th Cir. 2012). "Statements that . . . contain hearsay are particularly unreliable." *Id.* at 1183 n.18 (citation omitted).

v. Delo, 34 F.3d 1367, 1375 (8th Cir. 1994) (finding affidavits "suspect because they are replete with hearsay and fail convincingly to answer the question: why now?"). A long passage of time is especially suspect if a defendant has not given a "satisfactory explanation" as to why the affiants waited several years before coming forward with their information. *See Herrera*, 506 U.S. at 417–18 (finding unreliable affidavits that were written eight years after trial); *see also Guinan v. Delo*, 7 F.3d 111, 112 (8th Cir. 1993) (finding new witnesses' affidavits unreliable because "Guinan's explanations for the eleven-year delay between Guinan's trial and the discovery of these witnesses and their evidence is nonexistent or unpersuasive").

A court's suspicion toward an affidavit is "even greater" if the affiant has "nothing to lose." *Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007) (citation omitted); *cf. United States v. Silverstein*, 732 F.2d 1338, 1346 (7th Cir. 1984) (noting that a proffered witness lacks trustworthiness if he is already serving a life sentence because a perjury conviction "could not impose significant punishment").

Here, the circuit court found McAlister's affidavits "inherently not believable." (R. 76:29.) The court properly used its discretion in making that determination. Moreover, even under *de novo* review, that decision was correct.

All three of McAlister's affidavits are "particularly suspect" because "they consist of hearsay." *See Herrera*, 506 U.S. at 417. The affiants claimed that they had heard two other inmates—Nathan Jefferson and Alphonso Waters—say that they were going to commit perjury. (R. 47; 48.) The affidavits thus are unreliable because they depend on "hearsay jailhouse statement[s]." *See Rivera*, 596 F. Supp. 2d at 170.

The passage of time further shows that McAlister's affidavits are patently incredible. None of his affiants came forward until about five and a half to seven years after they allegedly learned about a plan to frame McAlister. Specifically, Wendell McPherson signed his affidavit seven years after he allegedly talked to Waters in prison, Corey Prince signed his affidavit five and a half to six and a half years after he purportedly talked to Jefferson in jail, and Antonio Shannon signed his affidavit about seven years after he allegedly talked to Jefferson in jail. (R. 47:1, 4–5; 48.)

That long passage of time makes McAlister's affidavits look especially incredible because he has "fail[ed] convincingly to answer the question: why now?" *See Murray*, 34 F.3d at 1375. McPherson and Shannon failed to explain why they did not go to the authorities in 2006—or even how or why they finally shared their affidavits and knowledge with McAlister in 2013. Prince was the only affiant who explained why he came forward, but he still failed to explain why he did not come forward much sooner. Prince claimed that he came forward when he overheard McAlister complain in 2012 about being framed by "Nate" and "Bird." (R. 47:5.) But Prince and McAlister have not given a "satisfactory explanation"—indeed, any explanation—as to why Prince did not inform the authorities about the plan to frame McAlister when Prince allegedly learned about it several years earlier in 2006 or early 2007. *See Herrera*, 506 U.S. at 417–18.

Besides being incredible due to their hearsay and timing problems, the three affidavits tell patently incredible stories. In the first affidavit, McPherson claimed that he and Waters had "rehearsed" Waters' lies in preparation for trial. (R. 47:3.) McPherson further claimed that Waters had written "a letter" to Jefferson while Waters was in the Racine County Jail. (R. 47:3.) The letter allegedly told Jefferson "exactly what to say" so that he and Waters could have consistent lies

against McAlister. (R. 47:3.) McPherson's story is patently incredible. If Waters' lies were complicated enough to require in-person rehearsal with McPherson, then it is unbelievable that Waters and Jefferson would be able to coordinate their lies in just one letter.

Prince's story in his affidavit is also patently incredible. He claimed that he just happened to be in the Racine County Jail with Jefferson several months before McAlister's trial. (R. 47:5.) Jefferson allegedly told Prince that "Bird" had told him to lie about "the older man" being involved in the robberies "so that they could receive a shorter sentence." (R. 47:5.) Prince further claimed that he ended up in Waupun Correctional Institution with McAlister in 2012, where he not only met McAlister but overheard him complain that "Nate" and "Bird" had set him up by lying and implicating him in robberies they had committed. (R. 47:5.) Prince claimed that he then introduced himself to McAlister and explained the conversation he had had with Jefferson several years earlier. (R. 47:5.) It is patently unbelievable that Prince would be in a position to hear Jefferson say in 2006 that he planned to frame someone and then, six years later, be in a position where he could hear McAlister complain about being framed by Jefferson. It is also unbelievable that Prince would be able to remember much about McAlister's case six years later—especially considering that Jefferson did not even identify McAlister by name when allegedly talking to Prince back in 2006. (*See* R. 47:5.)

Shannon's story is similarly incredible. Shannon claimed in his affidavit that he and a mutual friend of Jefferson's, "Amanda," had witnessed Jefferson flee from one of the robberies at issue here. (R. 48:1.) Shannon claimed that he had witnessed the robber running "with his head covered by his hood," did not know Jefferson at the time, met Jefferson two years later in the Racine County Jail, and then recalled

seeing Jefferson flee from the robbery. (R. 48:1.) Shannon further claimed that Jefferson had told Shannon in jail that he had "an out" for the robbery, but it would only work if "Bird" said the same thing. (R. 48:1.) It is patently incredible that Shannon witnessed Jefferson flee from a robbery, was in jail with Jefferson two years later, and had Jefferson share his plan to frame someone for that exact same robbery. It is especially incredible that Shannon would be able to remember Jefferson as the robber two years later—given that the robber's head was covered and Shannon did not know Jefferson at the time of the robbery. Indeed, an eyewitness named Amanda told police that she could not even tell the robber's race because he had "a hood pulled over his head, so she couldn't see [his] head at all." (R. 46:13.)

McPherson and Shannon have additional credibility problems. Each of them is serving a life sentence without extended supervision (R. 50:2), so they have "nothing to lose" if convicted of perjury for signing a false affidavit. *See Haouari*, 510 F.3d at 353. Moreover, McPherson and Shannon failed to explain how they were able to share their affidavits and knowledge with McAlister. That omission is especially troubling in Shannon's affidavit because Jefferson did not identify McAlister by name when allegedly telling Shannon about a conspiracy to frame someone back in 2006. (*See* R. 48.) How did Shannon learn that McAlister was Jefferson's patsy? How and where did Shannon contact McAlister in 2013? Shannon's affidavit and McAlister's postconviction motion did not answer those obvious questions. McAlister simply alleged in his motion—without explanation—that he learned in 2013 that Shannon and McPherson knew about the plan to frame him. (R. 46:3–4, 6.) It is patently unbelievable that two inmates serving life sentences would be able to find McAlister after seven years and give affidavits to him.

McAlister's contrary arguments have no merit. He argues that the circuit court stated in its oral ruling that only one affidavit was inherently unbelievable. (McAlister Br. 34.) He is wrong. The circuit court said, "As I read *these*, particularly the one that says, I assisted this person in concocting his testimony, I just—I find it inherently not believable based on the *affidavits* here, the arguments made—and I do believe this is a form recantation." (R. 76:29 (emphases added).) The circuit court thus meant that all of the affidavits were inherently unbelievable, *especially* McPherson's. The court confirmed this point when it said that McAlister did not show "a reasonable probability that a different result would be reached at [a new] trial." (R. 76:30.) Again, incredible evidence fails the "reasonable probability" requirement. *McCallum*, 208 Wis. 2d at 475. The circuit court's "reasonable probability" determination would make little sense unless the court meant that all three of McAlister's affidavits were inherently unbelievable.

McAlister notes that the circuit court's written order stated that the affidavits "have limited credibility," which, according to McAlister, does not mean inherently incredible. (McAlister Br. 34.) But an unambiguous oral ruling trumps a conflicting written judgment. *State v. Oglesby*, 2006 WI App 95, ¶ 27, 292 Wis. 2d 716, 715 N.W.2d 727. So, the circuit court's oral finding of inherent incredibility controls. In any event, the circuit court's written order also meant that the affidavits were inherently incredible. In *Kivioja*, the circuit court stated that a recanting accomplice's "reliability and credibility [were] seriously challenged." *Kivioja*, 225 Wis. 2d at 297–98. This Court concluded that this finding meant "incredible as a matter of law." *Id.* at 298. The circuit court here meant the same thing when it stated in a written order—which was drafted by the prosecutor—that the affidavits had limited credibility.

Of course, a circuit court may not deny a motion for a new trial because it finds a witness's testimony more credible than his or her recantation, *McCallum*, 208 Wis. 2d at 474–75, or because it finds the State's evidence more credible than the defendant's new evidence, *Edmunds*, 308 Wis. 2d 374, ¶ 18. But the circuit court here did neither of those things. It properly focused on the credibility of McAlister's new evidence and found it "inherently not believable." (R. 76:29.)

Although McAlister does not seem to argue otherwise, the State briefly notes that a circuit court has discretion to make factual findings based on affidavits alone, *see Honeycrest Farms, Inc. v. A.O. Smith Corp.*, 169 Wis. 2d 596, 604, 486 N.W.2d 539 (Ct. App. 1992), and to decide a recantation's credibility without a hearing, *see State v. Mayo*, 217 Wis. 2d 217, 229–30 & n.11, 579 N.W.2d 768 (Ct. App. 1998). Other courts have similarly held that a trial court may rely entirely on affidavits when deciding a motion for a new trial based on newly discovered evidence. *E.g., United States v. DiPaolo*, 835 F.2d 46, 51 (2d Cir. 1987) (collecting cases); *United States v. Kearney*, 682 F.2d 214, 219 (D.C. Cir. 1982) (collecting cases); *United States v. Ward*, 544 F.2d 975, 976 (8th Cir. 1976) (collecting cases).

In short, the circuit court properly used its discretion when it found McAlister's three affidavits inherently incredible. That finding was also correct under *de novo* review. And that finding means that there is not a reasonable probability that the affidavits would produce a different result in a new trial. This Court should affirm for this reason.

III. McAlister's new evidence lacks corroboration.

A. This Court should hold that a defendant must corroborate an admission of future perjury.

"[W]itness recantations 'must be looked upon with the utmost suspicion.'" *Haouari*, 510 F.3d at 353 (citation omitted) (collecting cases). Some reasons why are that recantations frustrate the finality of convictions and are "very often unreliable and given for suspect motives." *Id.* (citation omitted). The suspicion toward recantations is further supported by the fact that defendants routinely attempt to collaterally attack their convictions with affidavits of recantations. *Id.*

When newly discovered evidence is a recantation, it must meet a sixth requirement—it must be corroborated by other newly discovered evidence. *Ferguson*, 354 Wis. 2d 253, ¶ 24. A defendant may corroborate a recantation with physical evidence or a witness to the crime or by showing that "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." *McCallum*, 208 Wis. 2d at 477–78.

"Corroboration is required because recantation is inherently unreliable; the recanting witness is admitting he or she lied under oath. Either the original testimony or the recantation is false." *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶ 98, 278 Wis. 2d 111, 692 N.W.2d 572. This "sound reason" for the corroboration requirement led this Court to maintain it in *McCallum*, 208 Wis. 2d at 476.

Moreover, if a witness testified at a second trial that he committed perjury at a previous trial, his testimony at the second trial "would be entirely unreliable and not entitled to any weight without corroboration by some credible evidence

also newly-discovered." *Dunlavy v. Dairyland Mut. Ins. Co.*, 21 Wis. 2d 105, 114, 124 N.W.2d 73 (1963) (citation omitted). Without corroboration, a recantation would not "probably produce a different result on a new trial." *Id.* at 114 n.2.

This Court should hold that the corroboration requirement applies to a situation where, like here, the evidence consists of a witness allegedly admitting that he will commit perjury at a future hearing or trial—for two reasons.

First, the corroboration requirement applies not only to a recantation but more broadly to an "admission of perjury." *See, e.g.*, *Rohl v. State*, 64 Wis. 2d 443, 453, 219 N.W.2d 385 (1974); *Zillmer v. State*, 39 Wis. 2d 607, 616, 159 N.W.2d 669 (1968). If a person says that he *will testify* falsely or *has testified* falsely, either way he has admitted to perjury.

Second, the reason for the corroboration requirement applies regardless of when a person admits to perjury. In an admission to *future* perjury, a person "is admitting he or she [will lie] under oath. Either the [subsequent] testimony or the [prior admission of perjury] is false." *See Gehin*, 278 Wis. 2d 111, ¶ 98. Further, the person would be "entirely unreliable" in a second trial if he recanted his testimony from the first trial. *See Dunlavy*, 21 Wis. 2d at 114. Those reliability problems apply regardless of *when* a person first admitted to perjury.

McAlister argues that the reliability rationale for the corroboration requirement "does not apply when, as here, the conflicting statement is made *before* the witness testifies under oath. . . . The mere fact that a witness has made conflicting statements is an issue for the jury." (McAlister Br. 25.) McAlister is wrong for the reasons stated above. Further, his "issue for the jury" argument would equally apply to a recantation *after* a witness has testified. Under McAlister's logic, it should be an issue for a jury in a second trial to decide

whether a recanting witness lied in a previous trial. So, taken to its logical conclusion, McAlister's "issue for the jury" argument would completely eliminate the corroboration requirement. This Court has previously declined to eliminate the corroboration requirement and should do so again here. *McCallum*, 208 Wis. 2d at 476.

McAlister also contends that he should not need to corroborate Jefferson's and Waters' alleged admissions of perjury because informants are inherently unreliable. (McAlister Br. 24.) The premise of his argument is wrong because informants are not inherently unreliable. *See Kansas v. Ventris*, 556 U.S. 586, 594 n.* (2009) (concluding that uncorroborated jailhouse-informant testimony is not so unreliable that it must be excluded at trial); *see also United States v. Crater*, 79 F. App'x 234, 236–37 (7th Cir. 2003) (noting that a factfinder's role is to weigh credibility of witnesses, including jailhouse informants). Further, taken to its logical conclusion, McAlister's argument would eliminate the corroboration requirement for any informant's recantation—regardless of whether the informant admitted to perjury before or after testifying. Like in *McCallum*, this Court should reject McAlister's attempt to eliminate the corroboration requirement.

McAlister further argues "that recantations are limited to statements made by the witness *after* he or she testified differently at trial." (McAlister Br. 22.) He argues that under a contrary approach, the applicability of the corroboration requirement would hinge on when a recantation happened. (*Id.* at 22–23.) He contends that a recantation is admissible at trial without corroboration. (*Id.* at 23.) McAlister's arguments fail. *His* approach would have the timing problem that he identifies. Indeed, he argues that a defendant should need to corroborate a witness's admission of perjury only if it occurred *after* trial. (*Id.* at 22, 25.) This Court should reject that

approach because "[r]egardless of when recantation is offered, its inherent unreliability is static." *Kivioja*, 225 Wis. 2d at 296 (holding that a recantation is equally unreliable if made before or after sentencing).

McAlister also argues that "there is no rational basis for concluding that a coparticipant's or a cooperating witness' statements inculpating the defendant are more credible or reliable than are statements exculpating the defendant." (McAlister Br. 24.) The State does not argue otherwise. Of course, when a defendant seeks a new trial based on a witness's recantation, the defendant will often rely on a recantation of evidence *inculpating* him. *See Mayo*, 217 Wis. 2d at 227. But a defendant must corroborate a recantation regardless of whether it is a recantation of a statement inculpating him. *See id.*

This Court should hold that the corroboration requirement applies to an admission of future perjury.

B. McAlister did not corroborate his newly discovered evidence.

McAlister does not claim that he corroborated his affidavits with physical evidence or a witness to his crimes, so he can satisfy the corroboration requirement only if he shows that "(1) there is a feasible motive for the initial false statement; and, (2) there are circumstantial guarantees of the trustworthiness of the recantation." *McCallum*, 208 Wis. 2d at 477–78. The defendant in *McCallum* satisfied the second prong because "[t]he recantation [was] internally consistent," "given under oath," and "consistent with circumstances existing at the time" of the victim's initial allegation, and because the victim "was advised at the time of her recantation that she faced criminal consequences if her initial allegations were false." *Id.*

In *Rohl*, by contrast, the defendant "clearly" failed to corroborate a recantation because it was "not under oath and there [was] no new evidence offered to support it." *Rohl*, 64 Wis. 2d at 453.

The defendant in *State v. Terrance J.W.*, 202 Wis. 2d 496, 502–04, 550 N.W.2d 445 (Ct. App. 1996), also failed the corroboration requirement because the victim's recantation was internally inconsistent, the victim had been pressured to recant, and the recantation "fail[ed] to explain the basis upon which [the victim] remained silent about the false allegation for over two years and what motivated his decision to recant his former testimony."

Here, McAlister has not met the second prong of the corroboration requirement because he has not shown that Waters' and Jefferson's alleged admissions of perjury had circumstantial guarantees of trustworthiness—nor can he for three reasons.

First, like the recanting victim in *Terrance J.W.*, McAlister's three affiants failed to explain why they remained silent about their knowledge of perjury in McAlister's trial for years. The lack of an explanation is more troubling here because McAlister's three affiants stayed silent for about six or seven years, whereas the recanting victim in *Terrance J.W.* stayed silent for only about two years.

Second, there is no evidence that Alphonso Waters and Nathan Jefferson were advised at the time of their alleged admissions of perjury that they could face criminal consequences for lying at McAlister's trial. That fact distinguishes this case from *McCallum*, where the victim "was advised at the time of her recantation that she faced criminal consequences if her initial allegations were false." *McCallum*, 208 Wis. 2d at 478.

Third, Waters and Jefferson did not admit *under oath* that they were going to commit perjury against McAlister. Although McAlister has three affidavits claiming that Waters and Jefferson made such an admission, Waters and Jefferson themselves did not sign the affidavits. Like the recantation in *Rohl*, Waters' and Jefferson's alleged admissions of perjury were "not under oath and there is no new evidence offered to support [them]." *See Rohl*, 64 Wis. 2d at 453.

McAlister's affidavits do not corroborate each other. In *Ferguson*, two men recanted their earlier statements that Ferguson had shot someone. *Ferguson*, 354 Wis. 2d 253, ¶¶ 11, 14. The court of appeals concluded that the two recantations did not have circumstantial guarantees of trustworthiness and thus "neither served as newly-discovered corroboration of the other." *Id.* ¶ 31. It makes sense that a defendant cannot corroborate one witness's recantation by simply pointing to another witness's recantation. Corroboration is required because a recantation is inherently unreliable. *McCallum*, 208 Wis. 2d at 476. Unreliable "recantations are dubious even when considered jointly." *See Olson v. United States*, 989 F.2d 229, 231 (7th Cir. 1993). A recantation thus does not automatically show that a similar recantation has circumstantial guarantees of trustworthiness. This Court would gut the corroboration requirement if it were to hold that a defendant may satisfy that requirement by simply pointing to another recantation.

McAlister relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973), for the proposition that Waters' and Jefferson's alleged admissions of perjury corroborate each other. (McAlister Br. 26, 27.) *Chambers* does not apply here. The *Chambers* Court held that the defendant's constitutional right to present a defense was violated when the trial court prevented him from introducing evidence that another man had confessed to the shooting for which Chambers was being

tried. *Chambers*, 410 U.S. at 302–03. *Chambers* did not involve newly discovered evidence.

In short, McAlister has not met the corroboration requirement for an admission of perjury. The circuit court thus properly denied his motion for a new trial.

IV. While not an issue here, this Court should reject McAlister's invitation to eliminate the "mere impeachment" rule.

"[E]vidence which merely tends to impeach the credibility of a witness does not warrant a new trial upon the ground of newly discovered evidence." *State v. Debs*, 217 Wis. 164, 166, 258 N.W. 173 (1935) (collecting cases). The reason why is that newly discovered impeachment evidence is "often cumulative of other impeachment evidence presented at trial," *United States v. Salem*, 578 F.3d 682, 688 (7th Cir. 2009), or it is immaterial or does not show a reasonable probability of a different result on retrial, *see Greer v. State*, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968).

McAlister argues that the court of appeals erred here when it concluded that his new evidence was mere impeachment evidence. (McAlister Br. 16.) The State concedes that McAlister is right on that point.

McAlister further argues that the "mere impeachment" rule is not good law. (*Id.* at 14–15.) He urges this Court to eliminate it. (*Id.*) This Court should decline to do so. McAlister contends that impeachment evidence "may create a reasonable probability of a different result," relying on two Supreme Court cases and *Plude* (*id.*), where this Court stated that "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." *Plude*, 310 Wis. 2d 28, ¶ 47 (citing *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N.W. 274 (1913)). The *Plude* court recognized that "[i]t may well be that newly discovered evidence impeaching in character might be

produced so strong as to constitute ground for a new trial; *as for example where it is shown that the verdict is based on perjured evidence*." *Id.* (citing *Birdsall*, 154 Wis. at 52). The court concluded that Plude was entitled to a new trial based on new evidence that one of the State's expert witnesses had lied about his credentials. *Id.* ¶ 36. So, evidence that a verdict was based on perjury is not evidence that *merely* tends to impeach the credibility of a witness. The "mere impeachment" rule does not conflict with *Plude*.

Federal case law confirms this conclusion. Other courts, like *Plude*, have recognized that "it will be the rare case in which impeaching evidence warrants a new trial." *United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991); *see also United States v. Quiles*, 618 F.3d 383, 391–92 (3d Cir. 2010) (collecting cases). Yet those courts, like Wisconsin's courts, have also recognized that "long experience has shown that newly discovered evidence that is *merely* impeaching is unlikely to reveal that there has been a miscarriage of justice." *Quiles*, 618 F.3d at 392. "There must be something more, i.e. a factual link between the heart of the witness's testimony at trial and the new evidence. This link must suggest directly that the defendant was convicted wrongly." *Id.* "When this connection is not present, then the new evidence is merely impeaching and its revelation does not warrant granting a new trial." *Id.*

This Court should maintain the "mere impeachment" rule but not rely on it here. This Court should instead affirm for the reasons stated above.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 11th day of December, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,634 words.

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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

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Dated this 11th day of December, 2017.

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