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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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

BECAUSE HIS FACTUAL ALLEGATIONS, IF TRUE, MANDATE A NEW TRIAL, MCALISTER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS NEWLY DISCOVERED EVIDENCE MOTION

A. No Legitimate Basis Exists to Overrule 30 Years of Common Sense

The state's recycled request to overturn 30 years of established Wisconsin law and wise public policy, State's Brief at 6-7, 9-17, fails for both procedural and substantive reasons.

This Court long ago recognized the policy of this State that "[i]t is more important to be able to settle a matter right with a little uncertainty than to settle it wrong irrevocably." ***Hayes v. State***, 46 Wis.2d 93, 105, 175 N.W.2d 625, 631 (1970), different

holding overruled on other grounds, ***State v. Taylor***, 60 Wis.2d 506, 522-23, 210 N.W.2d 873 (1973). Not only would the state's suggestion deny demonstrably innocent defendants their chance at freedom; but it dings taxpayers $38,600 per year per innocent inmate as a result. Mai, Chris & Subramanian, Ram , The Price of Prisons - Examining State Spending Trends, 2010-2015, at 8 (Vera Institute for Justice 2017), available at www.vera.org/pubs/price-prisons.

Procedurally, the state waived its attempt to reinterpret Wis. Stat. §974.06 by failing to raise it below or in its response to McAlister's petition for review. *E.g.*, ***State v. Smith***, 2016 WI 23, ¶41, 367 Wis.2d 483, 878 N.W.2d 135 (arguments supporting lower court result not properly raised given respondent's failure to identify them in response to petition for review), *cert. denied*, 137 S. Ct. 520 (2016); ***State v. Van Camp***, 213 Wis.2d 131, 144, ¶26, 569 N.W.2d 577 (1997) (State waived alleged motion defects by not objecting in lower courts). The state's delay in seeking reinterpretation of §974.06 to exclude newly discovered evidence claims denied McAlister the opportunity to fully argue the point in his opening brief and raise an alternative interests of justice claim. ***Van Camp***, *supra*.

The state's request fails substantively. For 30 years, settled law has provided that newly discovered evidence raises state constitutional due process issues cognizable under §974.06. *E.g.*, ***State v. Love***, 2005 WI 116, ¶43, n.18, 284 Wis.2d 111, 700 N.W.2d 62***; State v. Bembenek***, 140 Wis.2d 248, 409 N.W.2d 432 (Ct. App. 1987). The state normally concedes as much. *E.g.*, ***State v. Fosnow***, 2001 WI App 2, ¶8, n.5, 240 Wis.2d 699, 624 N.W.2d 883.

Without dissent on this point, the Court rejected an identical attempt to overrule this authority 12 years ago:

> It 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. Due process and its guarantee of fundamental fairness ensure 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 the minimum criteria set forth above.

Love, 2005 WI 116, ¶43, n.18.

Stare decisis "further[s] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case." ***Johnson Controls, Inc. v. Employers Ins. Of Wausau***, 2003 WI 108, ¶95, 264 Wis.2d 60, 665 N.W.2d 257. Adherence to precedent is "fundamental to the rule of law," and existing precedent should "not be abandoned lightly" or without "special justification." ***Id.*** ¶94.

The state fails to suggest any reason why the Court should reach a different decision now than it reached without dissent on the point in ***Love***. It relies on the same misplaced arguments rejected in ***Love***.[1] "A mere change in the personnel of the bench, and of individual opinions of judges, is not sufficient." ***French Lumbering Co. v. Theriault***, 107 Wis. 627, 83 N.W. 927, 929 (1900).

As it did in ***Love***, the state misreads ***Herrera v. Collins***, 506 U.S. 390 (1993). ***Herrera*** concerns only the scope of federal habeas review, ***id.*** at 400-01, which itself is predicated on the

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[1] The state in ***Love*** adopted its arguments from ***State v. Armstrong***, Appeal Nos. 01-2789 & 02-2979. The state's ***Armstrong*** brief, as well as Armstrong's reply and the Innocence Project's amicus brief on this point, are available at http://library.law.wisc.edu/eresources/wibriefs/index.html?iDocket=012789&iJuris=&iCitation=

existence on an adequate state remedy. Wisconsin authority recognizing that newly discovered evidence is a matter of due process under the Wisconsin Constitution and, in any event, is cognizable under §974.06 are issues of *state* law. Wisconsin is not bound by the Supreme Court's interpretation of federal law when deciding if our state constitution and laws require greater protection of citizens' liberties. ***State v. Doe***, 78 Wis.2d 161, 172, 254 N.W.2d 210 (1977).

As the Supreme Court subsequently recognized, ***Herrera*** did *not* hold that an actual innocence claim based on newly discovered evidence fails to state a constitutional claim. *See* ***McQuiggin v. Perkins***, 569 U.S. 383, 392 (2013) ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence"). In fact, ***Herrera*** assumed without deciding that executing an innocent person would be unconstitutional, but held that Herrera could not meet the necessary burden of proof for such a claim. 506 U.S. at 417. *See also* ***id.*** at 405 (due process imposes identical standards in non-capital cases).

The Legislature, moreover, has rejected the state's theory. Even ignoring 30 years of precedent establishing that newly discovered evidence is a matter of due process, such claims are cognizable under Wis. Stat. §974.06(1)'s authorizations of challenges to convictions "otherwise subject to collateral attack." *E.g.*, ***Cresci v. State***, 89 Wis.2d 495, 505, 278 N.W.2d 850 (1979) ("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*" (emphasis added; footnote omitted)).

The Legislature itself has identified §974.06 as an appropriate vehicle for newly discovered evidence claims. The state's citation to Wis. Stat. §805.16(4) as authority for raising newly discovered evidence within one year of the verdict

overlooks the Legislature's recognition in the very next section that such a motion may be brought under §974.06 at *any* time:

> (5) The time limits in this section for filing motions do not apply to a motion for a new trial on newly discovered evidence that is brought under s. 974.06.

Wis. Stat. §805.16(5). The Legislature would not provide that newly discovered evidence claims may be raised under §974.06 at any time if the state were correct that they never may be raised under that provision.

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

1. The state properly concedes that the Court of Appeals' rationale is unsupportable

The state concedes that McAlister satisfied the first four requirements for a newly discovered evidence claim, i.e., that the evidence is new and material, that McAlister was not negligent in finding it, and, contrary to the Court of Appeals (App. 4-5), that it was not cumulative. State's Brief at 18, n.5.

The state also concedes that the Court of Appeals' reliance on the supposed "mere impeachment" rule (App. 5) was misplaced. State's Brief at 35-36. It also concedes that even newly discovered impeachment evidence may require a new trial based on the facts of the case, thus implicitly if not explicitly conceding that the "mere evidence" rule (i.e., that impeachment evidence can *never* be newly discovered evidence) is obsolete.

Rather than encouraging the type of confusion reflected in the decision below, the Court should again make clear that the "mere evidence" rule is baseless and defunct. McAlister's Brief at 13-16.

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

The state nonetheless tries to argue that pretrial admissions by the state's witnesses that McAlister was not involved in their misconduct could have had no impact on the verdict. State's Brief at 17-28. The state is wrong. McAlister's Brief at 20-36.

The state does not dispute that eyewitness evidence of McAlister's innocence is sufficient as a substantive matter to create a reasonable probability of a different result. After all, evidence that McAlister was *not* involved, if adequately credited by the jury, necessarily creates a reason to doubt the state's case.

Rather, the state argues that the interlocking, sworn assertions of three separate witnesses necessarily are so incredible that a jury could not possibly believe them enough to create a reasonable doubt. In effect, the state is arguing that the court is entitled to substitute its own views on credibility for those of a jury when the defendant seeks a new trial based on newly discovered evidence and that appellate courts must defer to those subjective findings.

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

"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). Wisconsin law is consistent

and logical, but for a few outliers,[2] in holding that courts are therefore not to substitute their own credibility findings for those of the jury unless evidence is 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). *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); ***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)); McAlister's Brief at 27-36 and authorities cited.

The requirement that courts defer to the jury unless the evidence is "incredible as a matter of law" under this standard is especially apt when assessing whether a post-conviction motion is sufficient to require a hearing. Unless the evidence is incredible as a matter of law,

> [w]hether that testimony is credible is not relevant for our purposes here. It must be accepted as true.

Love, 2005 WI 116, ¶54; *see* ***State v. Allen***, 2004 WI 106, ¶12, 274 Wis.2d 568, 682 N.W.2d 433 (allegations of motion must be accepted as true).

The state nonetheless seeks to carve out an exception to established "incredible as a matter of law" standards, replacing them with a squishy suggestion that courts should make *ad hoc*

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[2] *See* ***State v. Kivioja***, 225 Wis.2d 271, ¶¶52-66, 592 N.W.2d 220 (1999) (approving *ad hoc*, judge-centered analysis of whether witness recantation is sufficiently credible to create "fair and just reason" supporting pre-sentence plea withdrawal); ***State v. Carnemolla***, 229 Wis.2d 648, 600 N.W.2d 236 (Ct. App. 1999) (citing ***Kivioja*** and applying *ad hoc*, judge-centered credibility analysis).

credibility assessments of newly discovered evidence based on their own subjective perceptions of matters that have always been deemed exclusively the province of the jury. State's Brief at 21-28.

A couple of outlier cases have overlooked precedent and logic in that manner. *See* ***Kivioja***, *supra*; ***Carnemolla***, *supra*. However, principled decision-making and consistency require maintenance of the established "incredible as a matter of law" standard when assessing whether evidence is credible enough to be credited by a reasonable jury. Otherwise, evidence may be deemed credible enough to support conviction, which requires proof beyond a reasonable doubt, but not credible enough to support a new trial under a "reasonable probability of a different result," less than preponderance of the evidence standard. Logic and common sense cannot accept that result. *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).

The state does not suggest that McAlister's new evidence is incredible as a matter of law, and with good reason. There is nothing about either the state's witnesses' pretrial admissions to McAlister's innocence or the three affidavits reciting them that is "in conflict with ... nature or with fully established or conceded facts," ***Rohl***, *supra*.

Ignoring the requirement that they be accepted as true, ***Love***, *supra*, the state suggests reasons why the sworn allegations of McAlister's motion might be "suspect." State's Brief at 22-28. However, such an advocate's closing argument, proffering reasons why a future jury possibly could choose not to believe the newly discovered evidence, but not reasons why it must do so, is irrelevant. As demonstrated by any number of decisions rejecting exactly such challenges to evidence offered as proof

beyond a reasonable doubt, *see, e.g.*, McAlister's Brief at 29-33, and authorities cited, none of the state's complaints, alone or in combination, renders McAlister's evidence "patently incredible" or "incredible as a matter of law."

"If the facts in the motion are assumed to be true, yet seem to be questionable in their believability, the circuit court must hold a hearing." ***Allen***, 2004 WI 106, ¶12 n.6 (citation omitted). The suggestion that the affidavits recount "patently incredible stories," State's Brief at 24-26, is nothing but an advocate's spin and irrelevant here. *E.g.*, ***Love***, *supra*.

The state's arguments are baseless in any event. The affidavits do not "consist of hearsay." State's Brief at 8, 22-24. Pretrial statements that conflict with trial testimony, by definition, are *not* hearsay. Wis. Stat. §908.01(4)(a)1. Also, as we know from any number of sexual assault cases in which alleged victims delay reporting for years if not decades, *see, e.g.*, ***State v. McGuire***, 2010 WI 91, 328 Wis.2d 289, 786 N.W.2d 227 (charges filed 36 years after alleged sexual assault), such delay does not render evidence inherently incredible.

b. Reasonable probability of a different result is reviewed *de novo*

Consistent with its overall attempt to carve out an exception to the established rule of judicial deference to reasonable jury factfinding when addressing newly discovered evidence, the state asks the Court to alter the standard of review applicable to whether new evidence creates a reasonable probability of a different result. State's Brief at 17-20.

It is settled that review of that exact question is *de novo* in cases involving ineffective assistance of counsel, ***State v. Thiel***, 2003 WI 111, ¶¶23-24, 264 Wis.2d 571, 665 N.W.2d 305, and materiality of exculpatory evidence withheld by the state, ***State***

v. Harris, 2004 WI 64, ¶11, 272 Wis.2d 80, 680 N.W.2d 737, just as it is in the related context of harmless error, ***State v. Jackson***, 2014 WI 4, ¶44, 352 Wis.2d 249, 841 N.W.2d 791. The state provides no reason to create a special exception for review of claims raising newly evidence of innocence.

The state's suggestion that review of a circuit court's application of law to given facts is for "misuse of discretion" rather than de novo, State's Brief at 7, 21, is baseless. *E.g.*, ***State v. Jackson***, 2016 WI 56, ¶45, 369 Wis.2d 673, 882 N.W.2d 422 (appellate court independently determines application of constitutional law to given facts).

3. 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. Having now conceded its prior arguments were wrong, the state reverts to its previously abandoned argument. State's Brief at 29-35. Effectively conceding that prior inconsistent statements such as those at issue here do not fall within the current recantation-corroboration rule, the state seeks to extend the corroboration requirement to such statements. State's Brief at 29-32.

However, unlike an admission that one previously lied under oath, ***State v. McCallum***, 208 Wis.2d 463, 476, 561 N.W.2d 707 (1997) , or testimony in exchange for sentencing concessions, ***On Lee v. United States***, 343 U.S. 747, 757 (1952), statements inconsistent with subsequent testimony are not inherently unreliable. Indeed, prior inconsistent statements are deemed reliable enough to be excluded from the hearsay rule, Wis. Stat. §908.01(4)(a)1, to be admissible for their truth, ***Vogel v. State***, 96 Wis.2d 372, 383-84, 291 N.W.2d 838 (1980), and to satisfy the

state's burden of proof beyond a reasonable doubt, *e.g.*, ***State v. Samuel***, 2002 WI 34, 252 Wis.2d 26, 643 N.W.2d 423.

The state concedes that such statements exculpating the defendant are no less reliable than those inculpating him. State's Brief at 32. Its attempt to equate such statements with recantations of prior sworn testimony thus necessarily fails.

A newly discovered recantation must be corroborated by other newly discovered evidence. ***McCallum***, 208 Wis.2d at 476. Such corroboration need not consist of "physical evidence or a witness to [the] crimes." State's Brief at 29, 32. Rather, corroboration need only "extend to some material aspect" of the recantation. ***Dunlavy v. Dairyland Mut. Ins. Co.***, 21 Wis.2d 105, 114-15, 124 N.W.2d 73 (1963).

The three separate recantations by the state's witnesses corroborate each other. They satisfy the ***Dunlavy*** requirement, each attesting to the facts that McAlister was *not* involved in the robberies and that the state's witnesses nonetheless intended to frame him in exchange for sentencing concessions. The recantations are both internally consistent and consistent with each other. *Compare* ***State v. Ferguson***, 2014 WI App 48, ¶31, 354 Wis.2d 253, 847 N.W.2d 900 (inconsistent recantations do not corroborate each other).

The state's focus on credibility arguments an advocate may raise at trial regarding the affidavits again misses the point. It is the recantations that must be corroborated, not the sworn testimony recounting them, *e.g.* ***Brown***, 96 Wis.2d at 247, and those affidavits are not remotely incredible as a matter of law. Nothing more is required. ***Id.***

CONCLUSION

McAlister asks that the Court reverse the decisions below and remand for an evidentiary hearing on his newly discovered evidence claim.

Dated at Milwaukee, Wisconsin, December 26, 2017,

Respectfully submitted,

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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 2,995 words.

_____

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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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 26th day of December, 2017, I caused 10 copies of the Reply Brief 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.

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Robert R. Henak

McAlister S.Ct. Reply.wpd