STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2017AP001165 - CR

State of Wisconsin,
Plaintiff-Respondent,

v.

Sammy Joseph Hadaway,
Defendant-Appellant.

ON REVIEW OF AN ORDER DENYING A PETITION FOR WRIT OF ERROR CORAM NOBIS ENTERED ON MAY 30, 2017, HON. JOSEPH DONALD PRESIDING, AND A JUDGMENT OF CONVICTION ENTERED ON MAY 14, 1996, THE HON. DIANE SYKES PRESIDING IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY.

BRIEF & APPENDIX
OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

Here, the facts are extraordinary, the law fundamental, and the relief obscure.

In 1996, the State alleged — and a jury agreed —that Chaunte Ott, joined by two other men, had worked together to rob, sexually assault, and murder sixteen-year-old prostitute J.P. But ten years after Ott's initial conviction, DNA evidence implicated another man, Walter Ellis, in the crimes against J.P.

Indeed, the State would later charge Ellis, known as the Northside Strangler, with the murder of seven women: Quithreaun Stokes, Joyce Mims, Shelia Farrior, Florence McCormick, Irene Smith, Tanya Miller, Debra Harris. That's seven murders between 1986 to 2007.

Many similarities exist between the murder of JP and the murder of these seven women. Ellis' DNA was found on or in the victims bodies. All of the victims were either prostitutes or severe drug addicts. All of the murders occurred in the same area, five within seven blocks of each other. Most of the homicides occurred near a vacant house.

Based upon the new DNA evidence, this Court vacated Ott's conviction, observing, "this new evidence suggests that someone other than Ott may have killed [JP]."

This Court was the first of many tribunals to reach such a conclusion. The State Claims Board, for example, concluded, "there is clear and convincing evidence [Chaunte Ott] was innocent of the crime for which he was convicted." The Board also concluded "the physical evidence at the crime scene implicated Mr. Ellis, not [Ott], indeed there is no physical evidence linking [Ott] to the crime."

Ott ultimately obtained relief: released from prison, his name cleared, compensation for his wrongful conviction. His two alleged accomplishes have not been so lucky. One accomplice died. The second, Sam Hadaway, then a twenty-one-year-old former special-ed student with severe learning disabilities, accepted a plea. Hadaway, the appellant here, served a five-year sentence for his role, and, though, his sentence has long completed, he

continues to suffer the consequences of his wrongful conviction.

Wisconsin law provides only one avenue for Hadaway to clear his name: the writ of Coram Nobis. The Circuit Court denied Hadaway's petition for the writ, because the Court held that Hadaway failed to offer "conclusive proof" that he did not participate in the crimes against JP.

In so holding, the Court erroneously and inexplicably imposed an impossible burden of proof. Neither this Court, nor the Supreme Court, has determined the proper burden of proof for a claim seeking Coram Nobis relief.

Therefore, in this issue of first impression, Hadaway asks this Court to define the evidentiary standard that he must satisfy to clear his name.

STATEMENT OF ISSUES

I. In this question of first impression, whether the Circuit Court's conclusive-proof standard is the correct standard to evaluate a Coram Nobis petition?

The Circuit Court applied a conclusive-proof standard to evaluate Hadaway's petition.

II. Whether the Wisconsin Supreme Court's 1923 holding, in *Ernst v. State,* which prohibits Coram Nobis relief based upon an accuser's recantation, prevented the Circuit Court here from granting Coram Nobis relief?

The Circuit Court held, "a claim of perjury is not a basis upon which to grant the writ of *coram nobis."*

STATEMENT OF ORAL ARGUMENT

Hadaway does not believe oral argument is necessary to clarify or resolve any issues.

STATEMENT OF PUBLICATION

Hadaway recommends the Court publish its opinion in this case. Neither this Court nor the Wisconsin Supreme Court has articulated the burden of proof in a Coram Nobis case. Therefore, this case would have precedential value.

STATEMENT OF THE CASE

For his entire life, Sam Hadaway has suffered Cerebral Palsy, chronic refractory epilepsy, and a seizure disorder. (21:60). This combination of disabilities results in short-term memory problems as well as frequent complex partial seizers. (21:51-53)(21:84). Hadaway's disability "has rendered his left side weak and without sensation, a learning disability that makes it difficult for him to read or write, and a seizure disorder for which he takes medication to prevent him from seizing." (A-APP 107)(Order and Opinion. United States District Court). Further, these disorders cause significant language and vision impairments. (21:51-53).

In school, he took remedial classes, and, after graduating, he lived with his mother and sister. (21:88)(21:84). For most of his life, he has supported himself via Social Security disability. (21:84).

The Crime

On August 30, 1995, police found the body of JP, laying on her back, on the bare ground. (21:12). She was beneath a mattress, in the backyard of a house on Milwaukee's north side. (21:12). Her throat had been slashed; her bra had been torn; her pants had been pulled down to her ankles. (21:12-13). The scene strongly suggested that JP, a teenage prostitute, had been sexually assaulted. (21:20)(23:1).

The Investigation

The police collected physical evidence from the crime scene including vaginal swabs that revealed

semen. (21:20-21). The vaginal swabs were tested, but the results were inconclusive. (21:23). "A month later, an inmate at the Milwaukee County Jail told police that Richard Gwin had implicated himself in the murder of a young white woman." (21:20). When police interrogated Gwin, he told an elaborate tale in which he drove around with Ott, Hadaway, and JP; a tale that ended with Ott killing JP. (21:20). Based upon Gwin's statement, the police questioned Hadaway. (21:44-45).

The Police interrogated Hadaway

On October 24, the police took Hadaway to the MPD detective bureau, and Hadaway gave a voluntary statement. (21:72). In this first interview, Hadaway denied any involvement in JPs murder. (21:72-73). In fact, he told police that he didn't know any white girls at all. (21:72). "During the course of the interview, Hadaway was shown a picture of the victim, [JP]. He related that he had never seen this female before in his life." (21:72). Hadaway cooperated, consenting to provide samples of head hair, pubic hair, blood and saliva. (21:73)

On October 25, the police again questioned Hadaway, and, again, Hadaway denied any involvement in JP's murder. (A-APP 107)

On October, 26, the police once again questioned Hadaway, and, for a third time, Hadaway denied any involvement in JP's murder. (A-APP 107).

On October 27, Hadaway was arrested. He was 21 years-old, five-foot-six, and 160 pounds. (21:44). While he was in the city jail, Hadaway requested to speak with detectives. (A-APP 107). At the police station, Hadaway received Miranda, and waived his

right to counsel. (21:75). He affirmed this waiver, in writing, by affixing an "X" on the waiver's signature line. (21:75).

During this fourth interrogation, police again showed Hadaway a picture of JP, and, this time, Hadaway claimed to recognize her. (21:75)

Hadaway allegedly told police that he, Gwin, Ott and JP rode around in Gwin's car, and, eventually, he, Ott and JP exited the car at an abandoned building. (21:21). Ott, according to Hadaway, fought with JP, and Ott ordered Hadaway to hold JP as Ott picked through JP's pocket. Ott then tried to rape JP, pushing her onto a mattress, pulling her pants down, pulling up her shirt, forcing his way between her legs. (21:21). When JP resisted, Hadaway said Ott murdered JP, chocking her and finally slashing her throat. (21:21).

Fives day later, on November 1, detectives Mirandized Hadaway, who gave his official statement. (21:15). This final statement tracked Hadaway's previous oral statement. (21:15).

The police did not record, via audio or video, any of these interrogations.

Ott's Jury Trial & Hadaway's Plea

At Ott's trial, the State offered no physical evidence linking any person, including Ott and Hadaway, to the crime. (21:33). The State's sole evidence was the testimony of Gwin and Hadaway, both of whom repeated the story that they told police during their interrogations. (21:33)(21-21). A jury convicted Ott, and the court sentenced him to life in prison with parole eligibility in fifty years. (21:21).

After Ott's trial, Hadaway pled guilty to attempted robbery in exchange for his testimony against Ott. The Court imposed a five-year sentence. (21:94).

Post-Conviction DNA-Testing

In 2002, the Wisconsin Innocence Project, representing Ott, requested retesting of the vaginal swabs collected from JP. (21-33). The State crime lab developed an anonymous profile, however, the anonymous profile did not match any known profile in the national database. (21:33). The results excluded Ott, Hadaway, and Gwin as possible sources of the semen found in JP. (21:33).

In 2007, the State discovered that the anonymous profile from JP matched two additional anonymous profiles from unsolved murders. (21:33). In short, these three DNA profiles matched each other, but the three profiles failed to match any known perpetrators in the DNA databank. (21:33) (21:21-22). Therefore, authorities did not know to whom these profiles belonged; although, authorities knew that these three anonymous profiles did not belong to Ott, Hadaway, or Gwin. (21:33) (21:21-22).

Hadaway Recantation

As a part of a post-conviction investigation, Milwaukee Police re-interviewed Hadaway. (21:82). In these interviews, Hadaway admitted that he lied to police about his and Ott's involvement in the murder of JP. (21:82-85). He claimed he lied because "the detectives were playing nice cop/bad cop, and were yelling at him, and scaring him, and were telling him that he would do eighty years if he did not tell on Chauntee Ott." (21:83).

Hadaway also told investigators that he learned all the details of the crime from police. "Police detectives told him all of the things to say and that he made up a lot of the information." (21:83).

The police, Hadaway said, threatened and pressured him. Detectives told Hadaway "that if he went to court and even looked at Chauntee Ott during the trial, he would get the eighty years." (21:83). Throughout these interviews, Hadaway "reiterated that everything he said on the stand was a lie." (21:83).

This Court orders a new trial

In 2007, Ott filed a motion for a new trial based upon Hadaway's recantation and the new DNA evidence. (21:29); *State v. Ott*, 2009 WI App 21, 316 Wis.2d 355, 763 N.W.2d 248 (unpublished).[1] The Circuit Court denied Ott's motion, but this Court reversed. (21:19).

This Court observed that JP and the two other victims, "died in a very small geographical area." (21:27-28). Further, "in fact, [JP] and one of the other victims died just a few houses away from each other. All of the killings indicated a possible sexual component." (21:28). Lastly, this court observed, "Most conclusively, it is difficult to imagine more complex or distinct evidence than a single DNA profile found on all three victims." (21:28).

[1] The opinion in State v. Ott is unpublished. Here, the opinion is not cited for persuasive value. The case is merely cited for its facts. Wis. Stat. §809.23(3).

The Court ultimately concluded, "This new evidence suggests that someone other than Ott may have killed [JP]." (21:28).

The State learns Walter Ellis killed at least seven women

In 2009, the State matched all three anonymous profiles to Walter Ellis. (21:33). Ellis had an extensive criminal record that included arrests or convictions for solicitation of prostitutes, battery, reckless endangerment, theft, possession, and robbery. *See e.g.* State vs. Walter Earl Ellis, Milwaukee County. 1978-CF-3636 (Burglary); State vs. Walter Earl Ellis, Milwaukee County. 1980-CF-7995B (Robbery). State vs. Walter Earl Ellis, Milwaukee County. 1981-CF-327(Possession of illegal substance). State vs. Walter Earl Ellis, Milwaukee County. 1981-CF-1984 (Possession of illegal substance). State vs. Walter Earl Ellis, Milwaukee County. 1985-CF-2253 (Battery & Soliciting prostitutes). State vs. Walter Earl Ellis, Milwaukee County. 1986-CF-4258 (Theft); State vs. Walter Earl Ellis, Milwaukee County. 1994-CF-944838 (Reckless endangerment). State vs. Walter Earl Ellis. Milwaukee County. 1996-CF-964681 (Theft). State vs. Walter Earl Ellis. Milwaukee County. 1996-CF-964971 (Battery). State vs. Walter Earl Ellis. Milwaukee County. 1997-CF-972863 (Criminal trespass, Theft, and Bail jumping). State vs. Walter Earl Ellis. Milwaukee County. 1998-CF-1295 (2nd-Degree Reckless Injury). State vs. Walter Earl Ellis. Milwaukee County. 2006-CT-4212 (Hit & Run).

Based upon further investigation, the State learned that Ellis had committed several other murders. In 2009, the State filed a criminal complaint charging Ellis with seven counts of first-

degree murder. (21:96). These murders spanned from 1986 to 2007. (21:96-98).

In Count One, the State alleged that Ellis murdered Quithreaun Stokes. (21:97). According to the criminal complaint, Stokes was laying on her back, wearing "a jacket which was pulled up above her chest and also a shirt underneath which was also pulled up above her chest." (21:97-98). "Her panties were torn and her blue jeans had been partially removed with her left leg out of her pants and her right leg partially in her pants." (21:97-98).

In Count Two, the State alleged that Ellis murdered Joyce Mims, who was found "lying on her back" and "nude except for a pair of white socks." (21:98). Ellis attacked her throat, with "multiple abrasions and contusions to the neck, hemorrhage within the neck muscles, a fracture of the left hyoid bone..." (21:98).

In Count Three, the State alleged that Ellis murdered Shelia Farrior. (21:99). When found by police, she "was lying on her back, completely nude and appeared to have a bra which had been bound around her neck and mouth area." (21:99).

In Count Four, the State alleged that Ellis murdered Florence McCormick. (21:99). She, too, was found "lying on her back" at the foot of a laundry sink in a vacant house. (21:99). "Her wrists were secured with a rope and she was tied to the washtub sink." (21:99). Officers noted "[t]hat the rope also encircled her neck and that her body was cold to the touch and rigor mortis appeared to be setting in." (21:99).

In Count Five, the State alleged that Ellis murdered Irene Smith. She was found dead in an alley,

and police observed "stab wounds to her neck." (21:100). The medical examiner determined that Smith died from "exsanguination, loss of blood, due to stab wounds of the neck and she also was manually strangled." (21:100).

In Count Six, the State alleged that Ellis murdered Tanya Miller. (21:100). She was found "in a rear yard" and "lying face down." (21:100). The police collected vaginal swabs, and the coroner concluded she died of manual strangulation. (21:100).

In Count Seven, the State alleged that Ellis murdered Debra Harris. (21:100). Her body was found in the Milwaukee River. (21:100). She, too, died of ligature strangulation. (21:101).

The press labeled Ellis the Northside Strangler. (A-APP 123); *State v. Ellis*, 2013 WI App 1, 345 Wis.2d 398, 824 N.W.2d 929.[2] "Ellis subsequently pled no contest to the seven charges." (A-APP 123). "The circuit court sentenced him to seven consecutive life sentences." (A-APP 123). On appeal, Ellis argued that the seven murder counts should not have been joined. (A-APP 123-124). These seven intentional homicides, Ellis argued, were too dissimilar to try together. (A-APP 123-124). The State, in response, highlighted several key similarities between the murders. (A-APP 126-163). To quote the State's Response Brief:

"The State noted that the killings had these features in common:

1) The DNA of Walter Ellis is on each victim.

[2] The opinion in State v. Ellis is unpublished. Here, the opinion is not cited for persuasive value. The case is merely cited as the law of the case. Wis. Stat. §809.23(3).

2) All of the victims are prostitutes or severe drug addicts.

3) All of the murders occurred in the same area, five within 7 blocks of each other.

4) All of the murders occurred within a short vicinity of where the defendant was living at the time of the homicides.

5) The cause of death in all homicides was strangulation.

6) Most of the homicides occurred near a vacant house."

(A-APP 140-141).

The State further argued, "in short, the allegations against Ellis portrayed the actions of a serial killer who strangled his victims, vulnerable women who were prostitutes or who had severe drug addictions, in a relatively limited geographic [area] near to where Ellis lived." (A-APP 141).

Ott seek compensation

The State did not retry Ott, and Ott availed himself of his statutory right to receive compensation for a wrongful conviction. (21:33). The State Claims Board observed "the physical evidence at the crime scene implicates Mr. Ellis, not [Ott], indeed, there is no physical evidence linking [Ott] to the crime." (21:33). The State Claims Board awarded Ott, $25,000, the maximum amount that the statute permits. The State Claims Board, in granting Ott

compensation, found by clear and convincing evidence that Ott was innocent. (21:33).

Ott also filed a federal lawsuit against The City of Milwaukee and several police officers. The lawsuit alleged violations of Ott's constitutional rights. (A-APP 104-115).

In his deposition, a police detective admitted "that he told Hadaway about a statement made by Gwin regarding the [JP] homicide." (A-APP 108). Further, detectives conceded that they failed to follow proper interrogation procedures. Detectives, for instance, did not take notes in their official memo books, and Detectives destroyed some of those notes from their interrogation of Hadaway. (A-APP 109). Detectives "did not take notes in their memo books, instead they took notes during witness interviews—including their interviews of Cooper, Gwin and Hadaway—on steno pads and then destroyed the notes." (A-APP 109).

In his deposition, Hadaway repeated his recantation. He spoke, at length, about the conditions of his interrogation. In this deposition, Hadaway testified that "a police officer questioning him about [JP]'s death told him that they had evidence of Ott's involvement, and if they found Hadaway's fingerprints, 'it's going to be on [Hadaway], too.'." (A-APP 108). Hadaway testified that police "told him that [JP] was found near an abandoned house, that there was a mattress in the back of the house where she was found, and that [JP]'s neck had been cut." (A-APP 108). The police also "told Hadaway that he had to admit to his part so he could get a plea agreement and serve five years in prison instead of 80 years. Although Hadaway was afraid of lying, he believed he had "no choice. 'It was I do the life bit or the five years." (A-APP 108). Lastly, "during the

interrogation, the police would not allow Hadaway to speak to his family." (A-APP 108).

The State filed a motion for summary judgement, and, the Court denied the motion, viewing, as the standard required, the evidence in the light most favorable to Ott. The Federal District Court denied the motion, holding, "there is sufficient evidence that [investigators] could have coerced and manipulated Hadaway into testifying, and that one or more of these defendants provided facts to Hadaway."

The parties agreed to settle the lawsuit. (21:106).

Petition for Coram Nobis Relief

In 2017, Hadaway, his sentence now complete, filed a petition for the Writ of Coram Nobis. (21:1). He sought to clear his name and his record. The Court issued a two-page order that denied relief. (25:1).

Hadaway now appeals.

ARGUMENT

Wisconsin offers five mechanisms for a person to challenge their criminal conviction. *State v. Henley*, 2010 WI 97, ¶ 53 n. 21, 328 Wis.2d 544, 787 N.W.2d 350. Amongst these mechanisms is the common-law writ of coram nobis, which provides relief to a person no longer in the state's custody. *State v. Heimermann*, 205 Wis. 2d 376, 556 N.W.2d 756 (Ct. App. 1996).

Federal and state courts issue the writ of Coram Nobis to provide relief to persons who have completed their sentences. The United States Supreme Court, explaining the Writ, has noted that, after a person has served his criminal sentence, "the results of the conviction may persist." *United States v. Morgan*, 346 U.S. 502 (1954). In addition to social stigma, a person, with a criminal record, may face heavier penalties if convicted of other crimes. *Id.* at 512-13. The person may also lose some civil rights. *Id.*

In many jurisdictions, Coram Nobis relief has been viewed as akin to granting a new trial based upon newly discovered evidence. "[A] writ of error coram nobis is the ancestor of an extraordinary motion for new trial based on newly-discovered evidence." *Wayne v. State*, 239 Ga. 871, 238 S.E.2d 923 (1997). "The prerequisites for issuing a writ of error coram nobis or for granting an extraordinary motion for new trial based on newly discovered evidence appear to be identical." *Id.* "Before a court authorizes either, it is generally required that the moving or petitioning party base the pleading on facts which are not part of the record and which could not by due diligence have been discovered at the time of the trial." *Id.*

Florida, for example, has held relief based upon Newly Discovered Evidence or Coram Nobis are identical, with the lone difference being that the "writ of error coram nobis is where the defendant is no longer in custody." *Richardson v. Stat*e, 546 So.2d 1037 (Fla.1989)

In Wisconsin, "[a] person seeking a writ of coram nobis must pass over two hurdles." *Heimermann*, 205 Wis. 2d at 384. "First, he or she must establish that no other remedy is available." *Ibid*. "Second, the factual error that the petitioner wishes to correct must be crucial to the ultimate judgment and the factual finding to which the alleged factual error is directed must not have been previously visited or 'passed on' by the trial court." *Ibid*.

One core concept beats the heart of the writ. The petitioner must present a new and special fact. This new fact must be so compelling that, if the circuit court had known about the fact at the time of the judgment, then the circuit court would not have entered the judgment. *Jessen v. State*, 95 Wis.2d 207, 213, 290 N.W.2d 685 (1980).

Here, Mr. Hadaway argued that, if the Circuit Court had known these new facts --- that Ellis had raped and killed seven other women, that Ellis' Sperm-DNA was found on JP, that there were many similarities between the death of JP and Ellis' other victims, that Ellis had an extensive criminal history, that officers had provided Hadaway with details of the crime----if the Court had known these facts, then the Court would not have accepted his plea.

The Circuit Court denied the petition based upon two grounds. First, the Circuit Court concluded that Hadaway failed to provide conclusive proof that Ellis killed JP. Second, the Circuit Court, citing *Ernst v. State*, 181 Wis. 155 (1923), ruled that a claim of perjury could not act as a basis for Coram Nobis relief.

For two reasons, the Circuit Court erred. First, the Circuit Court imposed the incorrect burden of proof upon Hadaway. The Court adopted, without explaination, a conclusive-proof standard, when the Court should have adopted a preponderance-of-the-evidence standard.

Second, the Court misapplied the Coram Nobis perjury prohibition. The perjury prohibition, outlined in *Ernst,* makes clear that a court will not grant a petition that is based upon an accuser's recantation. Such is not the case here.

For these reasons, this Court should reverse the judgment of the Circuit Court, and should remand with an instruction to grant the petition for Coram Nobis relief.

I. The Circuit Court imposed an unreasonable and insurmountable burden of proof, and, thus, the Circuit Court erred.

In order to receive a writ of Coram Nobis, a petitioner must make several showings. Here, the parties disputed only one showing: whether the new evidence sufficiently established that another person may have murdered JP.

The Circuit Court, agreeing with the State, concluded that "the defendant has not demonstrated that his conviction was entered due to an error of fact for the purpose of the writ." (A-APP 102). The Court observed that "it has never been established in a court of law that Walter Ellis actually murdered [JP] or that Chaunte Ott is actually innocent of her murder." (A-APP 102).

The Circuit Court, adopting the State's analysis, concluded: "[T]he presence of [Walter] Ellis' DNA is not conclusive proof that Mr. Ott did not kill [JP] and it is not conclusive proof that Mr. Hadaway did not attempt to rob her." (25:1-2) (Brackets in original). The Court, in its own words, denied Hadaway's writ, in part, because the dismissal of Ott's case "do[es] not conclusively establish Ott's innocence of the homicide or Walter Ellis's guilt." (25:2).

The Wisconsin Courts have not adopted a burden of proof in Coram Nobis cases, but, here, the Circuit Court has clearly adopted the wrong one. In most jurisdictions, courts have adopted the preponderance-of-the-evidence standard. The remaining few have adopted the clear-and-convincing standard. Either standard is significantly lower than the Circuit Court's conclusive-proof standard.

Because the Circuit Court erred, this Court should remand with an instruction to grant the petition for writ of Coram Nobis.

A. Standard of Review: De Novo

The Circuit Court's grant or denial of a Coram Nobis petition is reviewed for erroneous exercise of discretion. *Heimermann*, 205 Wis. 2d at 386-87. A court erroneously exercises this discretion if the court applies a mistaken interpretation of the law. *State v. Tarlo*, 372 Wis.2d 333, 887 N.W.2d 898, 2016 WI App 81 (Ct. App. 1996). "[T]hough the decision of whether to grant a writ of *coram nobis* is left to the discretion of the ruling trial court, we can nonetheless conduct an independent review of [a] petition and determine whether, as a matter of law, there is any legal basis for such an exercise of discretion." *Heimermann*, 205 Wis. 2d at 386-87. (Italics in original).

Here, in reaching its final decision, the Circuit Court selected a burden proof. The selection of a burden of proof is a legal question, and, therefore, this court reviews this legal question De Novo. See e.g. *Shaw v. Leatherberry*, 706 N.W. 2d 299, 304. "In considering whether the proper legal standard was applied, no deference is due, because it is this court's function to correct legal errors." *State v. Keding*, 1997 214 Wis.2d 363, 571 N.W.2d 450.

B. The Circuit Court imposed the impossible and unreasonable requirement that Hadaway prove his claim beyond all doubt.

The phrase "burden of proof" encapsulates several important legal concepts. Here, the phrase "provides a standard for the degree of certitude

required of the fact finder." *Nommensen v. Am. Cont'l Ins. Co.*, 2001 WI 112, ¶ 2, 246 Wis.2d 132, 629 N.W.2d 301. In each burden, "[s]uch certainty need not necessarily exclude the probability that the contrary conclusion may be true." *Kuehn v. Kuehn*, 11 Wis. 2d 15, 26, 104 N.W.2d 138, 145 (1960).

The Circuit Court adopted the incorrect burden of proof to dismiss Hadaway's Petition. While the Wisconsin Courts have yet to decide the proper standard, the Court's adoption of a "conclusive proof" standard is clearly wrong, impossible to meet, and inconsistent with the burdens adopted by jurisdictions around the country.

"In its customary legal usage, conclusive evidence means that which is incontrovertible, either because the law does not permit it to be contradicted, or because it is so strong and convincing as to overbear all proof to the contrary." *Kirby Corp. v. Pena*, 109 F.3d 258, 263 (5th Cir. 1997) (Internal Bracket and Punctuation omitted)(Citing Black's law Dicitionary).

Indeed, most legal dictionaries agree that conclusive evidence proves a fact with absolute certainty. The Oxford legal dictionary defines conclusive evidence as ″Evidence that must, as a matter of law, be taken to establish some fact in issue and that cannot be disputed." *Conclusive Evidence*. Oxford Dictionary of Law. (7th ed. 2009).

Merriam-Webster's defines conclusive as "put[s] an end to debate or question esp. by reason of inability to be refuted." *Conclusive*, Merriam-Webster's Dictionary of Law. (1st ed. 1996).

Wisconsin does not impose upon any party, in any civil or criminal or administrative case, a conclusive-proof standard. Indeed, Wisconsin Courts have traditionally recognized three burdens of proof: high, middle, and low.

"The highest burden of proof applies in criminal cases, where the state has the burden of convincing the jury beyond a reasonable doubt of the defendant's guilt." *Marquez v. Mercedes–Benz USA, LLC*, 2012 WI 57, ¶36, 341 Wis.2d 119, 815 N.W.2d 314.

"In certain civil cases, a middle burden of proof is used, which is commonly described as requiring clear and convincing evidence. To meet the middle burden in Wisconsin, a party must convince the jury to a reasonable certainty by evidence that is clear, satisfactory, and convincing." *Id*.

Finally, "in most civil cases, the lowest, ordinary burden of proof applies, requiring what is commonly referred to as a preponderance of the evidence. In Wisconsin, the jury must be satisfied to a reasonable certainty by the greater weight of the credible evidence." *Id*. at ¶37. In short, proof by a preponderance of the evidence requires a mere showing that an occurrence is more likely than not. *State v. Rodriguez,* 2007 WI App 252, ¶ 18, 306 Wis.2d 129, 743 N.W.2d 460.

Therefore, the Circuit Court made two interrelated errors. First, the Circuit Court picked a standard that is not recognized by Wisconsin Law. Second, in deviating from established burdens, the Court created and adopted a standard that requires

absolute certainty, a standard that is excessively high and impossible for any petitioner to meet.

C. The Circuit Court should have adopted a preponderance-of-the-evidence standard, which is the standard adopted by many, if not most, jurisdictions.

In most jurisdictions, to obtain Coram Nobis relief, "The Standard of Proof was usually a preponderance of the evidence, but some jurisdictions required clear and convincing proof." L. Yackle, Postconviction Remedies. § 8, at 35 (1981 & 1986 Supp.). See also 39 Am Juris 2d, Habeas Corpus Sec. 233 (1999)("The petitioner bears the burden of overcoming the presumption that the previous judicial proceedings were correct, by either a preponderance of the evidence or, in another jurisdiction, by clear and convincing proof".).

Here, this Court should join the many jurisdictions that require a Coram Nobis petitioner to prove their case by a preponderance of the evidence. In Missouri, for example, "the burden of proof is on the movant or applicant he is required to present proof that supports his well-pleaded allegations and such allegations must be established by a preponderance of the evidence." *Arnold v. State*, 552 S.W.2d 286, 293 (Mo.App.1977). In Indiana, "The burden is on the appellant to prove by a fair preponderance of the evidence that he was denied his legal or constitutional rights." *Dobson v. State*, 242 Ind. 267, 177 N.E.2d 395 (1961). In Maine, "The appellant had the burden of proof as petitioner for the writ of error coram nobis and must support his allegations by a preponderance of the evidence." *Doyon v. State*, 158 Me. 190, 181 A.2d 586, 590 (1962).

Indeed, in jurisdiction after jurisdiction, a petitioner must prove their case by a preponderance of the evidence. See e.g. *People v. Lewis*, 166 Cal.App.2d 602, 333 P.2d 428; *Hurt v. State*, Okl.Cr., 312 P.2d 169 (1957); *State v. Liles*, 246 S.C. 59, 142 S.E.2d 433; *Medeiros v. State*, 63 Haw. 162, 163, 623 P.2d 86, 87 (1981); *Oliver v. State,* 2016 Ark. 784, 83 S.W.3d 298; *People v. Recore*, 29 A.D.2d 893, 287 N.Y.S.2d 992.

Further, Wisconsin cases suggest that courts have applied the preponderance standard. In *Mikulovsky v. State,* 54 Wis.2d 699, 196 N.W.2d 748 (1972), for example, the petitioner-appellant sought Coram Nobis relief, arguing that he deserved a new trial because the police coerced his confession. *Id*. 722. This Court affirmed a circuit court's denial of the petition, because "the trial court's findings of voluntariness are not against the great weight and clear preponderance of the evidence." *Id*. This holding suggests that Wisconsin Appellate Courts have, at least once, applied the preponderance standard to Coram Nobis petitions.

Lastly, this burden of proof is consistent with the burden, for a person in custody, to receive a new trial. For example, to prove a defendant received ineffective assistance, the defendant must show a "reasonable probability" that, but for counsel's unprofessional errors, result of proceedings would have been different. *State v. McDowell*, 2004 WI 70, 272 Wis.2d 488, 681 N.W.2d 500. A defendant, who claims that a prosecutor withheld exculpatory evidence, must show a "reasonable probability" that disclosure of exculpatory evidence would have resulted in different outcome of proceeding. *State v.*

DelReal, 225 Wis.2d 565, 593 N.W.2d 461. In order to support reversal based on the erroneous admission of prejudicial evidence, a defendant must show a reasonable probability that, but for the errors, the result of the proceeding would have been different. *State v. Giacomantonio*, 371 Wis.2d 452, 885 N.W.2d 394, 2016 WI App 62.

The reasonable-probability standard---articulated by the United States Supreme Court---is lower than the preponderance standard. See *State v. Dillard*, 2014 WI 123, ¶ 103, 358 Wis.2d 543, 859 N.W.2d 44.

Therefore, the Circuit Court should have applied the preponderance-of-the-evidence standard. Applying this standard, the Circuit Court should have asked: Which is more probable? That Sam Hadaway killed JP; or someone else killed JP.

D. No matter the standard, Hadaway satisfied his burden.

This Court should adopt a preponderance-of-the-evidence standard, but Hadaway prevails even if this court adopts the minority view, the clear-and-convincing standard.

The weight of the evidence against Walter Ellis is backbreaking. In 2008, before authorities knew the identity of Ellis, this Court observed that three matching anonymous profiles presented new evidence that "suggests that someone other than Ott may have killed [JP]." *Ott*, 316 Wis.2d 355, ¶18.

At that time, this Court also observed, "the three cases share several significant factual similarities. All three victims died in a very small

geographical area. In fact, [JP] and one of the other victims died just a few houses away from each other. All of the killings indicated a possible sexual component." *Id* at ¶17. Further, this Court observed, "[m]ost conclusively, it is difficult to imagine more complex or distinct evidence than a single DNA profile found on all three victims." *Id* at ¶18.

The Court's 2008 opinion has been bolstered by new and undisputed facts:

- The identity of serial killer Walter Ellis;
- Ellis has killed at least seven other women;
- Ellis' DNA was found on or inside the new victims and JP;
- Ellis had an extensive criminal history that included solicitation and battery;
- The newly discovered victims were found in the same geographic vicinity as JP;
- Ellis' victims were either prostitutes or severe drug addicts; JP was a runaway prostitute;
- The death of JP, like the newly discovered victims, occurred near a vacant house;
- Ellis either strangled or cut the throat of his victims. Indeed, Irene Smith had "stab wounds to her neck." (21:100). The medical examiner determined that Smith died from "exsanguination, loss of blood, due to stab wounds of the neck and she also was manually strangled." JP died of a cut throat and blood loss;
- Ellis committed his seven-charged murders between 1986 to 2007. JP died in 1995;
- Ellis committed these seven murders in Milwaukee; JP was found in Milwaukee.
- Ellis' victims were often found the same way, on their backs, often half or completely naked. JP was found, on her back, her pants around her ankles.

Indeed, the State has described Ellis as "a serial killer who strangled his victims, vulnerable women who were prostitutes or who had severe drug addictions, in a relatively limited geographic near to where Ellis lived." (A-APP 141). This statement could easily include JP.

Further, this Court has learned undisputed facts that weakened Hadaway's confession. These facts include

- Hadaway has recanted his confession;
- Detectives shared details of the murder with Hadaway prior to his confession;
- Detectives violated interrogation procedures;
- Detectives did not take notes in their memo books;
- Detectives took notes on steno pads and later destroyed the notes.

Further, the Court has learned the potentially-disputed facts that further weakened Hadaway's confession. These facts include:

- Police threatened Hadaway
- Police threatened that if he went to court and even looked at Chauntee Ott during the trial, he would get the eighty years
- Hadaway had cognitive disabilities that made him susceptible to coercion.

These facts, almost all of which are new, did not appear in the record at the time. If the Circuit Court had known these facts at the time of the plea hearing, these facts would have prevented the trial court from accepting the guilty plea and entering judgment thereon.

It's also important to note: If Hadaway were in custody, these facts would be sufficient to earn him a new trial. Ott earned a new trial, in the 2008, based upon much weaker facts. Indeed, the State primarily argued, in 2008, that this Court should ignore similarities between the victims, because the murders were remote in time. See *Ott*, 316 Wis.2d 355, ¶18 (acknowledging "that Payne was killed in 1995 and the other victims were killed in 1997 and 2007, the significant separation in time does not override the strong probative value of newly discovered DNA evidence linking someone other than Ott or the two State witnesses to all three murders.")

We now know that Ellis committed his seven-charged murders between 1986 to 2007. JP died in 1995.

E. Conclusion

For these reasons, this Court should reverse the order of the Circuit Court, and remand with an instruction to grant the petition for a Writ of Coram Nobis.

II. The Circuit Court, citing *Ernst*, incorrectly held that the writ's perjury prohibition barred relief.

The Court, in a single sentence, also denied the writ, because "a claim of perjury is not a basis upon which to grant the writ of coram nobis." (25:2) Here, too, the Circuit Court erred.

A. Standard of Review: De Novo

The issue of a writ is "a matter of sound judicial discretion." *Ernst*, 181 Wis. at 151. "It has been held that the decision of the trial court in refusing a writ is not reviewable, [b]ut such a rule does not obtain in our state." *Id*. Therefore, this court will "review discretionary orders and reverse if there has been an abuse of judicial discretion." *Id*.

The Court denied the petition based upon its interpretation of Supreme Court case law. The proper interpretation of case law raises a question that the appellate court reviews de novo. *State v. Starks*, 2013 WI 69, ¶ 28, 349 Wis.2d 274, 833 N.W.2d 146.

B. *Ernst* does not bar Hadaway's Petition

Around 1923, Ernst pled guilty to repeated sexual assault of his daughter. "In addition to the plea of guilty, his daughter also gave testimony to the effect that plaintiff in error had had sexual intercourse with her a number of times." *Ernst*, 181 Wis. at 156. Ernst, well after his plea, filed a petition for Coram Nobis, seeking to withdraw his plea. *Id*. He alleged, in part, that his daughter had recanted her testimony. *Id*. ("Now by affidavit she says she testified falsely on the trial."). The Circuit Court denied the petition, and the Supreme Court affirmed.

The Court held that "The writ of coram nobis does not reach a question of perjury by a witness on a trial." *Id*.

Thus, *Ernst* holds that an accuser's recantation cannot serve as the basis for Coram Nobis relief. The Court reaffirmed this principle in *Houston v. State*, 7 Wis.2d 348, 353, 96 N.W.2d 343 (1959). There, the defendant-petitioner again sought Coram Nobis relief. *Id*. And, there, again, the petitioner based his request upon the recantation of his accuser. *Id*. The court again reaffirmed that an accusers recantation is not the basis for Coram Nobis relief. *Id*.

The current case is substantially different.

First, Hadaway does not base his petition upon a claim that his accuser committed perjury in his case. Hadaway bases his claim upon the new evidence about Ellis. These new facts, not available at the time of a plea, include: (1) Ellis conviction for the murder of seven other women; (2) Ellis' Sperm-DNA was found on JP; (3) the many similarities between the death of JP and Ellis' other victims; (4) that Ellis had an extensive criminal history, (5) officers had provided Hadaway with details of the crime.

Second, Hadaway doesn't claim that any witness committed perjury in his case. Hadaway waived his preliminary hearing (6:1) He pled a few months later. (12:1). Therefore, no witness testified against him; and he doesn't base his Coram Nobis claim upon the recantation of any testimony in his proceedings.

The State, below, however, suggested that his coerced testimony against Ott should disqualify him

from relief. And the State cites *Ernst* to support this suggestion. But that is not the holding of *Ernst.* Indeed, the State pointed to no case in which perjured testimony, in a different trial, prohibits Coram Nobis relief.

Further, no Wisconsin Court has ever held that the writ cannot cure a guilty plea. Indeed, petitioners often use the Writ to seek plea withdrawal. *State ex rel. Patel v. State*, 2012 WI App 117, 344 Wis. 2d 405, 824 N.W.2d 862; *Hansen v. State*, 33 Wis.2d 648, 148 N.W.2d 4; *State v. Randolph*, 32 Wis.2d 1, 3, 144 N.W.2d 441 (1966)

Lastly, strong evidence suggests that his plea was the result of coercion. Hadaway's cognitive disabilities made him vulnerable to coercion. He has demonstrated learning, reading, and writing disabilities. Hadaway's interrogators provided him with the details of the murder. These interrogators were particularly aggressive, threatening to send him to jail and denying him an opportunity to see his family. These combined factors make Hadaway particularly susceptible to a false confession.

C. Conclusion

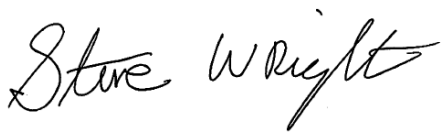
Because Hadaway's claim does not rest upon an accuser's recantation, and because Hadaway's claim rest upon new evidence, the Ernst perjury prohibition should not apply. Therefore, the circuit court erred and this Court should remand with an instruction to grant Hadaway's petition for Coram Nobis relief.

CONCLUSION

For these reasons, the Court should reverse the order of the Circuit Court, remanding with an instruction to grant the petition for the Writ of Coram Nobis.

Dated this 21st day of December 2017.

Respectfully submitted



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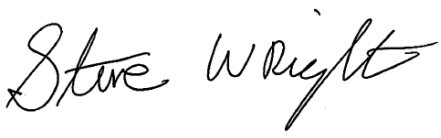
CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6327 words.

Dated this 21st day of December 2017.



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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

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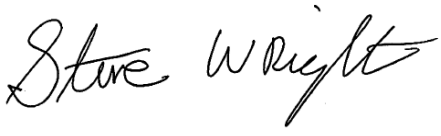

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CERTIFICATION AS TO COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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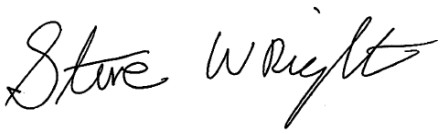

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