STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP002561
(Racine County Case No. 2005CF000324)

STATE OF WISCONSIN,

Plaintiff-Respondent,

V.

DAVID MCALISTER SR.

Defendant-Appellant.

Appeal From The Final Order Entered In The Circuit Court For Racine County, The Honorable Emily Mueller Circuit Court Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the post-conviction court erroneously exercised its discretion by summarily adopting the state's arguments and refusing to make specific findings regarding outstanding factual disputes.

After it asserted specific reasons for denying McAlister's claims, essentially based on incorrect "recantation" theory, the post-conviction court summarily adopted wholesale the arguments of the state's as part of its findings and declined McAlister's request that it make specific findings regarding disputed factual issues.

2. Does Newly discovered evidence that the state's two primary witnesses Alfonso Waters and Nathan Jefferson, admitted to other inmates prior to McAlister's trial of their scheme to obtain a lesser plea deal by testifying falsely for the state. The fact that Waters and Jefferson lied about McAlister being involved in these crimes mandate a new trial on due process grounds.

The post-conviction court erroneously ruled that the defendant's newly discovered evidence was simply recantation evidence, therefore the defendant did not meet the feasible motive for the initial false statement, or the circumstantial guarantee of trustworthiness of the recantation. The post-conviction court erroneously used the incorrect legal standard for a new trial based on newly discovered evidence.

3. Whether the post-conviction court erroneously exercised its discretion by ruling that the defendant's witnesses specifically(Wendell McPherson) has limited credibility thereby denying McAlister's due process.

The post-conviction court held that the witness assited another witness to testify falsely, thereby ruling Wendell McPherson inherently not believable.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in the case under Wis. Stat. (Rule) 809.22 Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication likely is justified under Wis. Stat.(Rule) 809.23 Although McAlister's entitlement to relief is clear under established authority, the circuit courts apparently need a published reminder, both regarding the meaning of "recantation evidence" and "newly discovered evidence" and the inappropriateness of cutting corners by merely adopting a party's arguments without explanation.

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BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF CASE

On March 4, 2005 Alphonso Waters(aka) Bird was arrested on a unrelated charge for allegally armed robbing Open Pantry Store located at 3441 Spring Street Racine, WI.(R1:4) Waters adamantly denied robbing the Open Pantry Store(R71:120) Waters continued to deny doing this particular robbery until the detectives allowed Waters to view the security video obtained from the Open Pantry Store (R71:121) Waters viewed himself actually committing armed robbery of the Open Pantry Store(R71:121). Waters faced with solid evidence against him, Waters immediately asked the detectives for assistance(R71:121). Stating, "What am I looking at?" "What can I tell you to help me?"(R71:121) Detectives advised Waters that they were unable to give him any promises, but they assured Waters that his cooperation would be beneficial for Waters in the future(R71:122). The detectives

told Waters that he matched the description of one of the suspects in the Wisconsin Auto Title Loan robbery(R71 :123) Waters agreed to provide information regarding that robbery, and other robberies he knew about(R71:123). Waters implicated the defendant David McAlister, Nathan Jefferson and Monic McAlister as participates(R71:126,135) On March 5, 2005 the defendant David McAlister was arrested.

On March 20, 2005 Nathan Jefferson was arrested(R1:4) Detectives questioned Jefferson about the attempted robbery of the Catholic Community Credit Union located at 726 Yout Street Racine, WI. (R1:4). Jefferson adamantly denied any involvement(R72:48). Jefferson, who was on probation at the time of his arrest, also hoped that by cooperating he would avoid revocation(R72:48-49). Jefferson sought consideration from the police because he did not want to go to jail.(R72:49) Jefferson admitted to intially lying about his involvement in the Credit Union robbery(R72:50). He did so because he did not want to go to jail(R72:50). The detectives showed Jefferson a photographic lineup that included a photo of Waters(R72:51). Jefferson lied and said he did not recognize anybody(R72:51). Detectives also showed Jefferson a photographic lineup that included a photo of McAlister(R72:51). Jefferson lied and said he did not recognize anybody(R72:51). Jefferson again lied because he did not want to go to jail(R72:51)

Jefferson was scared by what the detectives told him regarding the evidence they had against him(R72:52). Jefferson believed that he was going to get convicted(R72:52).

It was at that point that Jefferson asked the detectives, "What can I do to help myself?"(R72:53). Jefferson then proceeded to tell the detectives about the Credit Union robbery and the involvement of the defendant McAlister and Monique(Monic McAlister). (R72:53). Jefferson told the detectives that he would tell them the"same thing Waters told them"(R72:54). Jefferson was concerned about implicating Monique(R72:53-54). Monique(Monic McAlister) was never charged. The State charged McAlister in Racine County Case No. 05CF324 with nine charges arising from three separate robberies. Counts One, Two, and Three, Armed Robbery With Use of Force, Possession of Firearm by Felon, and Substantial Battery, all as a party to a crime, arose from an October 6, 2004 robbery of a Piggly Wiggly Store.(R1:1). Counts Four and Five, attempted Armed Robbery With Threat of Force as a Party to a Crime, and Possession of Firearm by Felon, arose from a December 21, 2004 robbery attempt of a Catholic Community Credit Union, hereafter referred to as the "Credit Union" robbery(R1:1). Count Six, Armed Robbery With Threat of Force, arose from a December 28, 2004 robbery of a Wisconsin Auto Title Loan Store, hereafter referred to as the "Title Loan" robbery(R1:1). Counts Seven and Eight, Armed Robbery With Treat of Force as a Party to a Crime, and Possession of a Firearm by Felon, arose from a February 19, 2005 robbery of a Subway Restaurant(R1:5). Count Nine, Possession of Firearm by Felon, arose from alleged possession by McAlister of a weapon at the time of his arrest(R1:5).

On motion of the state, the trial court dismissed counts seven, eight and nine prior to trial(R37:1).

On April 14, 2005 prior to attorney Patrick Cafferty becoming defendant's trial counsel, attorney Domingo Cruz appeared on behalf of the defendant at an preliminary/arraignment hearing. These proceedings in the above-entitled matter was before the HONORABLE DENNIS BARRY, Circuit Court Judge(R59:2-5). During these proceedings Nathan Jefferson appeared with his attorney Debra Patterson, Alphonso Waters also appeared with his attorney Douglas Pachucki. Although, Jefferson and Waters had previously confessed to the mentioned armed robberies, at this time Jefferson attorney advised him to implement his Fifth Amendment rights, the court found Jefferson unavailable for the purposes of the hearing(R59:5). Waters given immunity in regards to the robbery at the piggly wiggly store, Waters will be testifying as to his knowledge of that robbery(R59:6). Additionally, the armed robbery on February 19, 2005 at the subway store, and the armed robbery of the Title Loan business on December 28, 2004. Waters will be exercising his Fifth Amendment rights. This was all confirmed with Water's attorney Mr. Pachucki(R59:6) Basically, this proceedings is the start of Jefferson and Waters plea agreement with the state. The defendant McAlister and Jefferson remained confined to the Racine County Jail for approximately two years(22 months), Waters was incarcerated at Dodge Correctional Institution awaiting to testify at defendant's McAlister trial(R71:39).

On Janurary 22, 2007 David McAlister Sr. had an jury trial which lasted three days. The central issue at trial concerned whether McAlister was in fact one of the robbers(R70:90).. The state's case in that regard rested on two primary witnesses, Alphonso Waters and Nathan Jefferson(R70:91), which they both testified pursuant to an plea agreement that was disclosed to the defense prior to trial(R75:46,60). The defense "Theory of Defense" was that the state's two primary witnesses were in fact liars. During the second day of trial, defense attorney Patrick Cafferty vigorously cross-examined Alphonso Waters concerning his motive for testifying(R71:108-131,135-153) Waters adamantly denied testifying pursuant to an plea agreement(R71:124). Waters denial of the fact that he was not testifying pursuant to an plea agreement circumvented defense attorney Patick Cafferty entire cross-examination(R71:126,127). Even again on recross attorney Cafferty revisited Waters denial of an plea agreement. Explaining that, the prosecutor is going to do is he's somehow going to reducce your exposure? (R71:152). Waters stated "No-I didn't know any of that" "No one never--No one ever brought me anything about a deal to me, No"(R71:152). Your lawyer, who is sitting right there, your position is he has never discussed with you the fact that you have an agreement with the prosecutor?(R71:152).

Waters again answered No.(R71:153). Attorney Cafferty again ask Waters about his motive to testify, so it is your position that you have come here to court today to testify and you don't expect to be rewarded for it?(R71:153). Waters answers True.(R71:153). Even after all this questioning of the prosecutor's witness concerning the existence of an plea agreement, the prosecutor and Waters attorney strategically chose not to redirect the witness concerning this issue. The prosecutor adamantly objected to defense attorney Cafferty questioning Waters on recross concerning the plea agreement he had with the state(R71:139). Attorney Cafferty informed the Judge that he absolutely need to make a record(R71:139-149). The prosecutor argued that, attorney Cafferty questioning is way beyond the scope of any redirect he had done of Mr. Waters. Perhaps Mr. Cafferty forgot to ask any questions regarding the deal on his cross-examination. I Don't know. I thought perhaps it was a strategic decision on his part. I don't know. But to bring it up now is an improper time because it's beyond the scope of the redirect. Well beyond the scope of the redirect. So for both reasons I'd ask that my objection be sustained(R71:140) Although, attorney Cafferty did ask Waters about his plea agreement during cross-examination(R71:126,127). Attorney Cafferty explained, these are legitimate reasons I have for going into asking this witness these questions. And again, Judge if I can make my record. What this implicates is the defendant right to cross-examine the state's witness constitutionally

and his right to present a defense which is, this man has every incentive in the world to lie to this jury. That's our defense. And to deny him--deny us the opportunity to cross-examine is to deny him the defense(R71:142). The prosecutor replies, so the defense makes this relevant by presenting it's own testimony? In other words, present testimony I did not consider relevant or admissible, although I respect the court's ruling, and then by saying-- by me doing anything to attempt to counter their introduction of this evdence, suddenly questions regarding a specific deal that the defense was-- that the defense was familiar with before the trial even started, that somehow implicates that? No. It would have been proper on cross. It's not proper on recross(R71:143). "I did nothing in that regard that would make it--that would somehow make that relevant". Admittedly, it could have been relevant on cross. I don't think on recross it's even close, based on the questions I asked(R71:144). The Judge ruled, I'm going to allow the questioning. The redirect, although it's not all that clear, distinguished these statements of the witness from other statements in which he didn't implicate anybody else. I agree that it's a close question and on a discretionary ruling it may or may not be beyond the scope. But as a practical matter, I'm going to allow it at this time(R71:144). Continuing on recross attorney Cafferty again vigorously questioned Waters concerning his motive to testify, Waters continued to deny all knowledge of the existence of an plea agreement(R71:152-153).

Attorney Cafferty finally said, that he have no other questions for this witness Waters(R71:153). The court ask the prosecutor, Mr. Newlun: Nothing Your Honor(R71:153). Here, from the prosecutor statement, it becomes clear that although attorney Cafferty did in fact question Waters concerning his plea agreement during cross-examination(R71:126-127). According to the prosecutor statement, thinking that perhaps it was an strategic decision on attorney Cafferty part not to question Waters concerning a deal on cross-examination(R71:140). Therefore, perhaps the prosecutor strategy was to capitalize from this and not introduce Waters plea agreement to the jury. The prosecutor argued that, it would have been proper on cross, it's not proper on recross. "I did nothing in that regard that would make it-- that would somehow make that relevant"(R71:143). The defense did not have Waters plea agreement in writing, therefore attorney Cafferty could not impeach Waters concerning his plea agreement(R75:62). Attorney Cafferty acknowledged that once Waters denied having any agreement with the state, attorney Cafferty had an obligation to get the proper information before the jury(R75:62). On the night after Waters testified, attorney Cafferty phoned the prosecutor at home and discussed the situation(R75:63). They came up with the stipulation that the trial court read to the jury the next day(R75:63).

> The court informed the jury that the state in fact had an agreed to reduce Water's maximum potential sentence by either dismissing or reducing some charges and to recommend "less" prison time, and that the terms of this agreement were conveyed to Waters before he testified.

Attorney Cafferty believed that the situation could not have turned out better for defendant McAlister because the stipulation was essentially an agreement from the state that Waters had lied and committed perjury(75:64). A jury found McAlister not guilty on count one, two and three, and guilty on counts four, five and six(37:1)and(36:1). After a pre-sentence investigation, the trial court sentenced McAlister to 8 years confinement and 4 years extended supervision on count four, 3 years confinement and 3 years extended supervision on count five, and 17 years confinement and 5 years extended supervision on count six, consecutive to counts four and five(36:1). After McAlister's conviction, CCAP records reflect that the next day on Janurary 26, 2007 both Waters and Jefferson appeared before the trial court on their own cases(39:123,127)The records indicate that Jefferson entered a plea of guilty and that Waters recieved an offer from the state(39:123,127)After filing a notice of intent to pursue postconviction relief and the appointment of postconviction counsel, McAlister filed a motion for a new trial, which the trial court heard and denied (39:1-36)and(40:1). Pursuant to a notice of appeal, McAlister appealed the trial court's decision(R41:1-2). On September 23, 2009 the court of appeals issued a decision which affirmed the trial court order. **State V. McAlister** appeal No. 2008AP2995-CR at slip op. 2,¶2. Although McAlister's direct appeal was unsuccessful, the appellate court noted: " The bulk of the evidence tying McAlister to these crimes

came from the testimony of two alleged accomplices". On October 1, 2010 McAlister filed an Habeas Corpus to the United States District Court for the Eastern District of Wisconsin which was denied. On May 7, 2014 McAlister filed an post-conviction motion pursuant to Wis. Stat. §974.06 That motion alleged, newly discovered evidence that the state's two primary witnesses Alphonso Waters and Nathan Jefferson had informed other inmates of their intentions to obtain a lesser plea deal from the state. On May 19, 2014 Defendant filed a motion for appointment of counsel(R54:1). And again filed a motion for appointment of counsel (supplemental) pursuant to 974.06(3)(b) That motion was heard and denied on June 20, 2014(R49:1). The defendant submitted briefs on July 29, 2014(R50:1).and defendant's Reply brief on August 25, 2014(R51:1). On September 29, 2014 The Circuit Court heard Oral Arguments(R76:1). And the Circuit Court decided and ordered it's decision on October 10, 2014(R52:1, App. P.1). Therefore the defendant filed an Notion of Appeal on November 3, 2014 (R53:1).

ARGUMENT

I.

THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY WHOLESALE ADOPTING THE DISPUTED REASONING OF THE STATE'S ARGUMENTS BELOW WITHOUT A REASONED EXPLANATION OF WHAT REASONING IT WAS ADOPTING OR WHY

The circuit court erroneously exercised its discretion by adopting the state's argument wholesale, and without explanation, as supplemental reasons for denying McAlister's motion. The court's actions here denied McAlister an independent and neutral evaluation and resolution of the relevant factual disputes and, in the process, deprived this court of an adequate record for appellate review.

A. Factual Background

Having explained at length its specific rationale for denying McAlister's post-conviction motion based on a theory of "recantation" the circuit court nonetheless continued to summarily adopt wholesale the arguments in the state's briefs "as part of its findings with respect to this determination" (R76:8) McAlister objected that, given the number of significant factual disputes, none of which contributed to the court's stated reasons for denying his motion, it was inappropriate for the court to merely adopt the state's arguments without explanation (R76:10) McAlister requested specific findings on the factual disputes that the court intended to rely upon in light of the fact that the state's argument simply made no sense.

The state continued to argue that the defendant newly discovered evidence was "recantation evidence" subject to the **McCallum** standards specifically stating that the defendant has failed to showed that the "feasible motive" required was newly discovered, and that there is no circumstantial guarantee of trusthiness of the recantation.(R76:10). The court denied that request and cut off McAlister's argument on particular factual disputes with the conclusory assertion that it was,"in essence....adopting the state's reasoning" (R76:12).

B. The Post-Conviction Court Erroneously exercised its Discretion

The circuit court erroneously exercised its discretion by adopting the state's argument wholesale, and without explanation, as supplemental reasons for its denial of McAlister's motion.

As the Seventh Circuit has explained:

> A district judge could not photocopy a lawyer's brief and issue it as an opinion. Briefs are argumentative, partisan submissions. Judges should evaluate briefs and produce a neutral conclusion, not repeat an advocate's oratory. From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disquises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. Judicial adoption of an entire brief is worse. It withholds information about what arguments, in particular, the court found persuasive. and why it rejected contrary views.

DiLeo v. Ernst & Young, 901 F.2d 624.626(7thCir.1990) Such wholesale adoption of a party's briefs "obscures the reasoning process of the judge.....deprives this court of the findings

that facilitate intelligent review,...and causes the losing litigants to conclude that they did not receive a fair shake from the court." **Walton v. United Consumers Club,Inc.** 786 F.2d 303,313(7thCir.1986) It presents the judge as "a mouthpiece for the winning party...rather than a disinterested evaluator of the seversl advocates urgings" **Id.**,

See also **Bright v. Westmoreland county**, 380 F.2d 729, 732(3rd Cir.2004)

> Judicial opinions are the core work-product of judges. They are much more that findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When the court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Wisconsin authority is in accord. Although a court may adopt a party's argument, it must "articulate the factors upon which it based its decision." **Trieschmann v. Trieschmann**, 178 Wis 2d 538, 542, 504 N.W. 2d 433(Ct.App.1993) It must explain in nonconclusory terms why it found the party's position to be convincing. **Id.** at 542-44(Court misuses discretion by merely adopting party.s position "without stating any reasons for doing so other than its belief that doing so was the only just solution") **Compare In The Interst Of Joy P.**, 200 Wis. 2d227 241, 546 N.W. 2d. 494(Ct. App. 1996) (no misuse of discretion where court discussed reasoning in adopting state's postion)

Here, the post-conviction court's rationale for denying McAlister's motion as expressed in open court relied on a perceived lack of resulting prejudice rather than on resolution of any factual disputes (R76:13-14) The court also refused to make specific findings on disputed factual issues or to give reasons for any factual finding beyound the conclusory assertion that it was adopting the state's reasoning. (R76:16). even when McAlister attempted to raise specific factual disputes and identified one particular dispute where the state's position made no sense (R76:16) the court simply reiterated the same conclusory assertion that it was adopting the state's reasoning(R76:16-17) The circuit court's actions thus reflect, not merely the erroneous exercise of discretion by failing to explain its wholesale adoption of the state's arguments, but an abdication of its judicial role. See **Bright** 380 F.3d at 731-32 (reversing and remanding in absence of evidence that fact finding by adoption of party's arguments was product of judge's independent judgement) which, when combined with its refusal to address the specific factual disputes raised by McAlister, left the clear impression that the court did not even know what facts it was actually finding by adopting the state's argument.

Finally, the circuit court neither identified what specific arguments or facts in the state's brief it found compelling nor why, rendering appellate review impossible. We know, after all, that the court did adopt all the state's reasoning since it even ask the District Attorney's office to prepare the order. And thus the defendant recieved two orders, one

from the District Attorney's office and the other from the Judge.(App. P 2) The reason for the court's decisions, we simply do not and cannot know without remand. Without that knowledge, this court is left to speculate, making appellate review of any such decisions by this court impossible. Remand for appropriate findings accordingly is required here. See **Wurtz V. Fleischman**, 97 Wis 2d 100, 108, 293 N.W. 2d 155 (1980)("when an appellate court is confronted with inadequate finding and the evidence respecting material facts is in dispute. the only appropriate course for the court is to remand the cause to the trial court for the necessary finding") quoted in **Trieschmann**, 178 Wis 2d at 544

II. NEWLY-DISCOVERED EVIDENCE MANDATES REVERSAL

After McAlister's conviction and sentence, he learned that, Alphonso Waters had admitted to Wendell McPherson that he had lied to police investigators about McAlister being involved in these robberies, and that he intended to testify falsely at McAlister's trial to obtain a lesser plea deal from the District Attorney(App. P.3-5). Sometime later, he also learned that prior to McAlister's trial, Nathan Jefferson had admitted to Antonio Shannon and Corey Prince that he intended to fabricate his testimony against McAlister based on what Waters had instructed Jefferson to say, so they both would recieve a better plea deal from the District Attorney(App. P.6-8)

Waters and Jefferson's admissions that they intended to falsely accuse defendant was made prior to their false testimony at McAlister's trial. Therefore, the defendant contends that McPherson, Shannon and Prince testimonies constitutes newly discovered evidence, and is sufficient to show that the result of McAlister's trial would have been different. Defendant's newly discovered evidence "directly contradicts" Waters and Jefferson's trial testimonies, affirming evidence of McAlister's innocence. **Vogel v. State,** 96 Wis.2d 372, 383-84, 291 N.W.2d 838(1980). In his opening and closing arguments, the state heavily emphasized Waters and Jefferson's testimonies. Stating, "Listen carefully to the evidence, its ultimately going to come down to Mr Waters and Mr Jefferson, if you believe them you'll find the defendant guilty." (R73:59-60) "although there's no firm agreement, there is an agreement that you will get consideration for providing "truthful" testimony. Additionally, you understand that the state will recommend less prison time because of your "truthful" testimony that they would have had you not testified." The defendant newly discovered evidence is that, the states two primary witnesses Waters and Jefferson "did not" provide truthful testimony. The defendant's newly discovered evidence is that, the states two primary witnesses provided false testimony and recieved compensation for it, and ultimately sent an innocence man to prison for twenty five years.

Whether individually or in combination, this newly discovered evidence demonstrates more than a reasonable probability of a different result and thus mandates reversal of McAlister's conviction.

A. Factual Background

1. Water's admissions to McPherson

Wendell McPherson states in his affidavit that, in March 2006 prior to McAlister's trial. He and Alphonso Waters a.k.a. "Bird" were confined in the same living unit at Dodge Correctional Institution, while living on this unit they became friends and often discussed their pending charges.(App. P.11)McPherson further states, Waters told him about his pending robberies charges, and robberies he had comitted that he had not been charged with. Waters stated that he had a plea deal with the district attorney concerning his pending charges, but he was afraid that the district attorney was going to somehow find out about the other armed robberies he had committed, and the fact that, he and his partner(co-defendant) Nathan Jefferson was lying about a man name David McAlister being involved in these robberies. Waters continued to state, when he had first gotten arrested for these armed robberies, he absolutely denied any and all involvement with these armed robberies. Then after the police told him all the evidence they had against him, Waters said he could no longer deny it and asked the police for a deal. Waters said he needed to come up with a lie so he could throw someone under the bus, and that's when David McAlister entered his mind.

And as soon as he mentioned David McAlister's name the police became very interested in whatever he had to say.(App. P.12) Waters told me that he lied when he told police that, David McAlister planned these robberies, Waters also said he lied to the police about McAlister had gave him a gun to use and that he was the get away driver. McPherson asked Waters why was he going to lie and throw McAlister under the bus? Waters stated that he didnt like McAlister, and that he did'nt have a choice but to lie in order to get a plea deal. (App. p.13) So while living on this unit together, McPherson and Waters rehearsed the lies Waters would tell in court, whereas he would be very convincing.

2. Jefferson's admissions to Prince

Corey Prince affidavit states that, while incarcerated in the Racine County Jail from 1-04-2006 until 05-25-2007. During this period of time he was housed in several units with Nathan Jefferson. While being housed with Jefferson a number of inmates constantly harassed him about being a "sellout" meaning someone who offers testimony for money or personal gain.(App.P.14) Jefferson confided to Prince that his co-defendant Alfonso Waters a.k.a. "Bird" had instructed him on exactly what to say in regards to their pending cases. Jefferson told me that he and Waters lied to investigators and the District Attorney, by saying that an older man they knew was involved and orchestrated the robberies they were charged with.

Jefferson told Prince the truth, that the older man was never involved in any of the robberies they committed, that "Bird" instructed him to lie so thay could recieve a shorter sentence.

Prince states while at Waupun Correctional Institution in 2012, he was assigned to work at the recreation department. While working he overheard an inmate name David McAlister talking about his case, about how two guys named Nate and Bird had set him up by lying and implicating him in their robberies. I introduced myself to McAlister, I told him that I had knowledge of his case through my interactions and conversations with Nathan Jefferson. (App. P.14)

3. Jefferson's admissions to Shannon

Antonio Shannon states in his affidavit that, on December 28, 2004 he was sitting in his car with a lady name Amanda. They were parked in the "Auto Zone" parking lot on Durand Ave. in Racine, WI. While they were talking, they observed a man man running toward them with his head covered by his hooded sweater, he was holding up his pants or something in his waistband. Shortly thereafter they heard police sirens and saw police cars go past on Durand Ave. At that point, he believe Amanda called 911 to report what we observed and Shannon left. Two years later in 2006, Shannon was in the Racine County Jail on Unit 4-D with an inmate name Nathan Jefferson a.k.a. "Nate Dogg".

Jefferson and I began to discuss people we knew personally, and we discovered that we both knew Amanda. As time passed, we engaged in other small talk and it became obvious that Jefferson was worried about something regarding his case, so we went into my cell to talk. Jefferson told Shannon about his involvement in the robbery of the Wisconsin Title Loan store. Shannon told Jefferson that he remembered seeing him run away from the scene, Shannon believe it was their discussion of Amanda that triggered his disclosure of the robbery. Jefferson went on to tell me that, him and a man name "Bird" were the only two people that committed the robbery, he did not mention anyone else.(App. P.15) Jefferson said the money was fast and good, but he couldn't handle the time he was now facing. I told him that it was'nt my place to talk to the police if that was his concern. Jefferson then told me that he had a way out, or a way to get a time cut. I did'nt ask him what his way out was, but he did say that, the only way it would work was if "Bird" said the same thing. We went back into the dayroom to watch T.V.

The next day while back in the dayroom, Jefferson told me that he had a plea deal for 5 years in and 5 years out if he took the stand against someone that he said was not involved in the robbery. I told him that it was'nt cool for him to lie on somebody else for what Jefferson did wrong. Jefferson said, I was right and we did'nt talk anymore that day, later that night or the next day he was moved to another unit.

B. Applicable Legal Standards

This court explained the requirements for newly-discovered evidence claim as follows:

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

State v.Edmunds, 2008 WI App 33, 13,308 Wis2d 374,746 N.W.2d 590.

The standard of review is confused. Newly discovered evidence claims present due process issues,e.g.,**State v. Love** 2005 WI 116, 43, n.18, 284 Wis.2d 111, 700 N.W.2d 62, which generally are reviewed de nova. **State v.Coogan**, 154 Wis.2d 387, 395,453 N.W.2d 186(Ct. App. 1990). However, the courts have stated without explaination that newly discovered evidence claims are reviewed for erroneous exercise of discrettion. E.g., **State v. plude**, 2008 WI 58,31, 310 Wis.2d 28, 750 N.W.2d 42. Even then, factual findings are reviewed for clear error, Wis. Stat. 805.17(2), and the reasonable probability analysis is an issue of law reviewed de nova.¶ **Plude**, 33. Of course, whether evidence is material and not merely cumulative also would appear to be legal determinations and thus reviewed de novo even in the context of review of discretion.¶ **Plude**, 31 (erroneous exercise of discretion where court applies wrong legal standard).

C. Application of the Newly Discovered Evidence Test

For the reasons which follows, McAlister satisfied each of the first four requirements for newly discovered evidence. Because reasonable probability of a different result must be assessed cumulatively, that is addressed in section IV, infra.

1. Water's Pre-Testimony Admissions to McPherson Constitute Newly Discovered Evidence.

There is no rational dispute that evidence that both of the state's primary witnesses gave an account of the offense that excluded the defendant is material. After all, such an admission is affirmative evidence of McAlister's innocence. Moreover, the evidence is not cumulative since the issue of McAlister's involvement was the central disputed issue at trial.

The state nonetheless argued that McAlister already knew at the time of trial that Waters and Jefferson was testifying for a deal from the state.(R76:16) Here, the defendant argues that the newly discovered evidence "is not" apparently recantation statements made by the witnesses against the defendant. Specifically, the state's two primary witnesses Alfonso Waters and Nathan Jefferson made pre-testimony admissions. Alfonso Waters pre-testimony admissions to Wendell McPherson constitutes newly discovered evidence. Additionally, Nathan Jefferson's pre-testimony admissions to Antonio Shannon and Corey Prince constitutes newly discovered evidence.

2. Water's Admissions to McPherson Constitute Newly Discovered Evidence

There can be no rational suggestion that McAlister knew or should have known prior to his trial in 2007 that Waters would confess years later that, McAlister was not, in fact, guilty of the crimes for which he was convicted. While McAlister knew at trial that Waters was lying, and the fact that the District Attorney was rewarding him for his false testimony, Water's admission of that fact did not exist until after the trial. Nor can it rationally be suggested that affirmative evidence that McAlister in fact was innocent is somehow immaterial or cumulative.

The state's "recantation" theory fails because Water's admission that McAlister was not involved in these robberies was not "recantation" evidence, but affirmative evidence of McAlister's innocense. E.g.,**Vogel**. 96 Wis.2d at 383-84. The state's suggestion that Waters admission to McPherson was not adequately corroborated also is baseless (R76:27, App. P.8). **State v. McCallum**, 208 Wis. 2d 463, 473-74, 561 N.W. 2d 707. a witness admission to having lied(i.e. recantation)although this is not recantation evidence but admission of lying, must be corroborated by other newly discovered evidence. **McCallum** makes clear, however, that the defendant need not show that the witenss confessed perjury to two separate witnesses. Rather, the defendant meets the corroboration

requirement simply by showing a feasible motive for the initial false accusation and circumstantial guarantees of the trustworthiness of the recantation (lie) **Id** at 477-78

Here, Waters admission to McPherson and Jefferson's admission to Prince and Shannon, independently corroborates each other. Also, the evidence reflects both a feasible motive for the initial false accusation and circumstantial guarantees of trustworthiness of the recantation(lie) **McCallum**, 208 Wis2d at 477-78. As Waters explained in his admission to McPherson, he had a motive for the initial, false accusation in that he would obtain a lesser sentence by lying and would face a longer one if he told the truth that McAlister was not involved(App. P.11-13). Waters motive was not revealed until Waters admitted it to McPherson,(App.P.11-13). Moreover, circumstantial guarantees of trustworthiness exist for the recantation to McPherson because, unlike his testimony at trial, Waters had nothing to gain by telling McPherson the truth about McAlister's lack of involvement. Indeed, given the general ridicule faced by jailhouse snitches, even when telling the truth about misconduct of other inmates, Waters would not have admitted to having falsely accused another inmate if he had not done so,cf. **Wis. Stat.** 908.045(4) (Circumstantial guarantee of trustworthiness where person makes statement which, at time it is made, so makes the declarant an object of ridicule or disgrace "that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true".)

3. Jefferson's Pre-Testimonial Admission to Prince and Shannon Constitutes Newly Discovered Evidence.

Jefferson admissions likewise meets each of the requirements for a new trial based on newly discovered evidence. Jefferson's admissions to Corey Prince and Antonio Shannon were made prior to McAlister's trial(App.p14-16)The defense thus also was not negligent in seeking this evidence because, although they knew that Jefferson lied at trial, they had no way of knowing that Jefferson had admitted that fact to anyone. **State V. Stureon**, 231 Wis2d 487, 500-01, 605 N.W. 2d 589 (although defendant knew at time of plea that he had given exculpatory statements to the police, he did not know that the police had memorialized them). The evidence also is material to the case since Jefferson's false testimony formed one of the three prongs critical to the state's evidence that McAlister was involved in the robberies. It likewise was not cumulative because the truth of Jefferson's claims was actively disputed at trial. See **Washington**, 219 F3d at 634(Evidence not cumulative unless supports previously established fact). Jefferson's admissions to Prince and Shannon that he intended to falsely accuse McAlister were made prior to his false testimony at McAlister's trial, as such, although not discovered by McAlister until after his trial, they were prior inconsistent statements, not recantation subject to the corroboration requirements of **McCallum**, supra. In any event, Jefferson stated desire to obtain a plea deal from the District Attorney provided the

feasible motive for the initial false accusation, and circumstantial guarantees of the trustworthiness of Jefferson's admissions to Prince and Shannon are demonstrated by their nature as both a statement against interest, Wis. Stat. §908.045(4), and a statement of then existing state of mind or intent, Wis Stat. §908.03(3). See **McCallum**, 208 Wis2d at 477-78.

RECANTATION

1. To withdraw or renounce(prior statements or testimony) formally or publily, the prosecution hoped the eyewitness wouldn't recant her corroborating testimony on the stand.
2. To withdraw or renounce prior statements or testimony formally or publicly, under grueling cross-examination, the witness recanted.

The new evidence creates a reasonable probability of a different result.

" 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, quoting **McCallum**, 208 Wis.2d at 474. Assessment of the effect of the newly discovered evidence on the defendant's trial accordingly must be made based on the totality of the circumstances. In other words, it is the cumulative effect of all of the errors and the new evidence tht matter, including those deemed harmless in isolation McAlister's appeals. See, e.g. **State v. Thiel**, 2003 WI 111,¶¶ 59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel). McAlister, morover, need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors. **Kyles v. Whitley**, 514 U.S. 419, 434-35 (1995). Rather, he need only show a reasonable probability of a different result. **Love**, supra.

It is indisputable that evidence that McAlister was not involved in the robberies and that the state's two main witnesses nonetheless conspired to frame him for those robberies creates a reasonable probability of a different result. With this new information, little if any credible evidence against McAlister remains. There is no indication the state had any physical or any other evidence directly tying McAlister to these crimes, other than the testimony of Waters and Jefferson.

This newly discovered evidence of McAlister's non-involvement in these robberies and Waters and Jefferson's admissions that they conspired to frame McAlister likewise create more than a reasonable probability that a jury provided with that new evidence would totally discredit Waters and Jefferson allegations. It is one thing for a jury to know that those witnesses had a motive to frame McAlister; It is much stronger hearing evidence that they not only had the motive to do so, but conspired with each other to act on that motive.

Although unknown to the jury at the time, evidence of those who seek to avoid or mitigate the consequences of their own misconduct is inherently incredible. See, e.g., **OnLee v. United States**, 434 U.S. 747, 757 (1952)(use of such informers "may raise serious questions of credibility") **Dudley v. Duckworth**, 854 F.2d 967,972(7th Cir. 1988)("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dudious witnesses"). Such witnesses have an obvious motive to falsify. **United State v. Bernal-Obeso**, 989 F2d 331, 334 (9th Cir. 1993). There are risks inherent in the use of informers or cooperating witnesses looking to better their own lot at the expense of others. These dangers are borne out both in the cases and by scholarly research. **Bernal-Obeso**, 989 F2d at 334 ("Our judicial history is speckled with cases whree informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison").

The Ninth Circuit, for instance, has noted that, "although the truthful testimony of accomplice witnesses will continue to be a great value to the law, rewarded criminals also represent a great threat to the mission of the criminal justice system." **Commonwealth of the N. Mariana Islands v. Bowie** 243 F.3d 1109, 1124 (9th Cir. 20001)

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the goverment. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot....

Id. at 1124 (footnote omitted). Much like the situation here, **Bowie** involved a conspiracy among government witnesses to falsely accuse another of responsibility for a homicide. See also **Bernal-Obeso**, 989 F.2d at 333:

> The use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril... By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.

In their landmark study of errors leading to the conviction of innocent people, Professors Radelet and Bedau discovered that the "most frequent[is]perjury by prosecution witnesses."

Beyond the testimony of Waters and Jefferson, the state has no evidence tying McAlister to these robberies. However, Waters and Jefferson had an obvious motive to lie, to obtain a lesser plea deal. The jury credited Waters and Jefferson testimony, the new evidence easily could cause it to question McAlister's quilt. The newly discovered evidence from McPherson, Prince and Shannon exposing Waters and Jefferson as liars leaves more than a reasonable probability that a jury, looking at both the trial evidence and the newly discovered evidence, would have a reasonable doubt as to McAlister's quilt. McAlister consistently denied his involvement. A defendant's denial, when corroborated by direct evidence of his innocense and independent evidence of fraud by witnesses against him, is much stronger that his denial alone. E.g. **State v. Harris**, 2003 WI App 144, ¶40, 266 Wis. 2d 200, 667 N.W. 2d 813 **State v. Sturgeon**, 231 Wis. 2d 487, 505, 605 N.W. 2d 589(1999).

Any Corroboration Requirement is Satisfied

As noted supra **McCallum**, 208 Wis2d. at 473-74, requires that a witness admission to having lied at trial must be corroborated by other newly discovered evidence to justify reversal on the grounds of newly discovered evidence. Here, although, McAlister's newly discovered evidence is that the state's two primary witnesses Waters and Jefferson, admitted "prior" to testifying at McAlister's trial that they intended to lie whereas they would recieve a lesser plea deal.

One way to satisfy that requirement is to show a feasible motive for the initial false accusation and circumstantial guarantees of the trustworthiness of the recantation. **Id.** at 477-78. "Assurances of trustworthiness can include the spontaneity of the statement, whether the statement is corroborated by other evidence in the case, the extent to which the statement is self-incriminatory and against the penal interest of the declarant, and the declarant's availability to testify under oath and subject to cross-examination." **State v. Kivioja**, 225, Wis.2d 271, 296-97 592 N.W. 2d 220 (1999).

Although newly discovered recantation testimony must be corroborated, McPherson, Prince and Shannon information is not recantation evidence and therefore requires no such corroboration. Likewise, McPherson, Prince and Shannon's evidence of Waters and Jefferson's contemporaneous admissions regarding their decision to frame McAlister, are not rationally viewed as "recantation" evidence. As it appears, Waters and Jefferson had not yet testified at the trial, then their statements while conspiring to frame McAlister are "prior" inconsistent statements rather than a recantation. One cannot recant testimony yet to be given.

In **Dunlavy v. Dairyland Mut. Ins. Co.,** 21 Wis.2d 105, 114, 124 N.W. 2d 73(1963) This Appeals Court stated: " A recanting witness is admitting that he or she has lied under oath, either the original sworn testimony or the sworn recantation testimony is false".

III. THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY RULING THE DEFENDANT'S WITNESSES INHERENTLY NOT BELIEVABLE

The circuit court erroneously exercised it's discretion by ruling that the defendant witnesses have limited credibility, (R76:29, App.P.9) thereby denying McAlister's right to due process. The state argues that the defendant has presented as new evidence is purported jailhouse recantations made by serious criminals, specifically, Wendell McPherson and Antonio Shannon are currently serving life sentences without parole(R76:12) Their testimonies would be inherently unreliable, since they have no possible punishment available for them, should they commit perjury(R76:12). Adding additional time for a perjury conviction to someone who is already serving life imprisonment without parole, results in no additional punishment, and thus McPherson and Shannon have no incentive to testify truthfully.

Here, the defendant claims, there is nothing inherently unreliable about the defendant's witnesses testimonies. The purposed witnesses Wendell McPherson and Antonio Shannon testimonies are not in conflict with nature or with fully established or conceded facts. **Rohl v. State**, 65 Wis.2d at 695 The prosecutor based it's conviction on Waters and Jefferson's testimonies(R73:59-60). It was determined that Waters and Jefferson was facing 154 years imprisonment(R71:152). Therefore, they had 154 incentives to testify falsely. The circuit court erronrously based it's decision from a cold record, not having the opportunity to scrutinize McPherson and Shannon's demeanors upon testifying.

Moreover, it is up to a jury to determine how much weight and credibility to give to any witness. **State v. Nelson**, 2006 WI App. 124, 52, 294 Wis.2d 578, 718 N.W.2d 168. The general rule in Wisconsin is that issues of witness credibility and weight to be given to their testimony are matters for the jury to decide. **State v. Frierich**, 135, Wis. 2d 1, 16, 398 N.W.2d 763(1987). Additionally, although McPherson and Shannon have life sentences without parole, their testimonies is equally as entitled to credit by a jury as the testimony of a police officer **Rohl v. State**, 65 Wis. 2d at 695(Jury entitled to believe evidence unless it is inherently incredible, i.e. "in conflict with...nature or with fully established or conceded facts".) The defendant further states, a criminal defendant has a fundamental right to a trial by jury guaranteed by the sixth amendment to the United States Constitution and Article 1, Section 7 of the Wisconsin Constitution. **State v. Anderson**, 2002 WI 7, 10, 249 Wis.2d 586, 638 N.W.2d 301. Consistent with this fundamental right, Wisconsin law provides that it is ordinarily the task of a jury to decide both the credibility of a witness and the weight to be given to his or her testimony. **Friedrich**, 135 Wis.2d at 16. This principle is confirmed by Wis JI-Criminal 300, which instructs; It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole.

You are the sole judges of the credibility, that is, the believability of the witnesses and of the weight to be given to their testimony. Under certain circumstances it is possible for a circuit court to determine that a witness's testimony is incredible as a matter of law, it must be cognizant that even though there be glaring discrepancies in the testimony, that fact in itself does not result in concluding as a matter of law that the witness is wholly incredible. **Ruiz v. State**, 75 Wis 2nd 230, 232, 249 N.W. 2d 277(1977). Also, McPherson testimony is within the realm of believability in light of the totality of the evidence in the case, and McPherson testimony is materially beneficial to the defendant's theory of the case.

Also, Antonio Shannon testimony has veracity, whereas he states the he was sitting in a car in Auto Zone parking lot talking with Amanda Angove, who happens to be the manager of Auto Zone which is located across the street from the Wisconsin Title Loan Store which had just been robbed. Amanda Angove called 911 to report that she had witnessed a man running past her while sitting in her car, although from her vantage point, she could not clearly see the man face. Antonio Shannon was able to see the man face and later recognize him as Nathan Jefferson while in the Racine County Jail.(App. P.15)

IV. THE COMBINED EFFECT OF THE IDENTIFIED ERRORS PREJUDICED McALISTER'S DEFENSE

Contray to the Circuit Court's assessment(R76:29-30,App.P.9-10) the combined effect of the errors and new evidence create far more than a reasonable probability of a different result here. Indeed, they create a very real probability that a innocent man stands convicted and sentenced to 25 years in prison. Resting, as it apparently does, on its adoption of the state's reasoning(App. p.10), the circuit court's prejudice analysis necessarily rests as well on the state's erroneous statement of that standard. The question is not whether the defendant can prove both that the state's errors "render the resulting conviction unreliable" and creates a reasonable probability of a different result(App. P.10) Rather, the Supreme court has made clear that the defendant need only show a reasonable probability of a different result; No supplemental, abstract inquiry into the "fairness" or reliability of the proceedings is permissible. **William v. Taylor**, 529 U.S. 362(2000). McAlister, moreover, need not prove that acquittal is more likely than not or that the evidence is legally insufficient but for the identified errors or new evidence. **Kyles**, 514 U.S. at 434-35.

The central issue at McAlister's trial was whether he was in fact one of the robbers. The state's evidence in that regard consisted of Waters and Jefferson testimony pursuant to a plea deal.

The identified errors and new evidence undermine each of these two pillars of the state's case. McPherson, Prince and Shannon's affidavits demonstrates that the state's primary witnesses lied about McAlister, or at least supports a reason to doubt Waters and Jefferson's testimony. Moreover, McPherson, Prince and Shannon's affidavits is evidence that undermines Waters and Jefferson's false testimony bolstered by the prosecutor's opening and closing argument, that they had nothing to gain from their testimony. A juror reasonably could(and undoubtedlly would) view evidence that, contrary to their trial testimony, Waters and Jefferson did in fact fabricated (lie) their allegations against McAlister to gain a lesser plea deal from the state. McPherson, Prince and Shannon testimony undermine Waters and Jefferson's credibility in a way not available to the original jury.

As already explained, moreover, it goes farther than that. Waters admissions to McPherson and Jefferson's admission to Prince and Shannon that McAlister in fact was not involved in the robberies do not merely undermine the credibility of their trial testimony; they are affirmative evidence of McAlister's innocence. **Vogel**, 96 Wis.2d at 383-84, this evidence of actual innocence did not exist at the original trial and directly undermines the state's entire case. There is nothing inherently unreliable about the new witnesses testimony. Unlike Waters and Jefferson's, upon whose testimony the state based its conviction, the testimony of McPherson, Prince and Shannon was internally consistent and they had

nothing to gain by telling what they knew. Although the defense witnesses had prior criminal convictions, so did the state's primary witnesses. The defendant's evidence is equally as entitled to credit by a jury as the testimony of a police officer. E.g. **Rohl v. State**, 65 Wis.2d at 695 (jury entitled to believe evidence unless it is inherently incredible, i.e.,"in conflict with... nature or with fully established or conceded facts). see also **Ronda**, supra (Police officers convictioned of obstruction of justice and perjury). The relevant question, moreover, is not whether this court believes the defense witnesses, but whether a reasonable jury could believe them to the extent necessary to create a reasonable doubt. **McCallum**, 208 Wis.2d at 474.

CONCLUSION

For these reasons, David McAlister Sr respectfully asks that the Court reverse the order denying his postconviction motion, vacate the judgment of conviction, and remand with directions to enter an order granting him a new trial.

Dated at Fox Lake, Wisconsin. May 20, 2015.

Respectfully submitted,

DAVID MCALISTER SR.
Defendant-Appellant

David McAlister Sr.

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 20th day of May , 2015 I caused 5 **copies** of the brief and appendix of Defendant-Appellant David McAlister Sr. to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688 Madison, Wisconsin. 53701-1688

David McAlister Sr.

Mr. David McAlister Sr. Pro Se.

APPENDIX CERTIFICATION

I hereby certify that I filed, as part of this brief an appendix that complies with §809.19(2)(a) which contains: (1) A table of contents. (2) Relevant trial court record entries. (3) The findings or opinion of the trial court. (4) Portions of the record essential to an understanding of the issues raised, including oral or written ruling or decision showing the trial court's reasoning regarding those issues.

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

David McAlister Sr.

~~Mr David McAlister Sr.~~

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 8029 words.

David McAlister Sr.

Mr. David McAlister Sr. Pro Se

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.

David McAlister Sr.

Mr. David McAlister Sr. Pro Se.