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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I.

THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY DENYING MCALISTER'S MOTION WITHOUT AN EVIDENTIARY HEARING.

The Circuit Court erroneously exercised its discretion by finding: The three affidavits in support of McAlister's motion, the Circuit Court stated: "As I read these, particularly the one that says, I assisted this person in concocting his testimony, I find it inherently not believable based on the affidavits here" (R76:29). (The Circuit Court was referring to McPherson's affidavit) The Circuit Court continued stating, the affidavits being a form of recantations.

The Supreme Court of Wisconsin has defined"incredible evidence" as evidence "in conflict with the uniform course of nature or with fully established or conceded facts." see **Simos V. State,** (1972) 53 Wis.2d 493, 495, 496, 192 N.W.2d 877. **Rohl V. State,** 65 Wis.2d 683. The defendant asserts that, the information in the affidavits are contrary to the definitions defined by the Supreme Court of Wisconsin. Therefore, a Circuit Court must hold an evidentiary hearing whe a post-conviction motion "on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law the appellate Courts review de novo". see **State V. Allen,** 2004 WI 106,¶ 9, 274 Wis2d 568, 682 N.W.2d 433. Here, the post-conviction Court erronrously exercised its discretion, when McAlister's affidavits in support of his motion raised sufficient materail facts. (1) Testimony regarding possible false accusations against McAlister calls into question whether McAlister actually participated in the crimes for which he was convicted. (2) The jury that convicted McAlister did not hear this testimony. (3) This testimony was within the realm of believability in light of the totality of circumstances of the case, and (4) The testimony materially benefical to the defendant's theory of the case. **Nelson V. State,** 54 Wis.2d 489, 497, 195 N.W.2d 629(1972). **State V. Bentley,** 201 Wis.2d 303, 309-10, 548 N.W.2d 50. Moreover, the defendant motion contained an historical basis setting forth material facts that allows the reviewing Court to meaningfully assess the defendant's claims. Mere conclusory allegations have been contrasted from assertions of those material facts, which are defined as a fact that is significant or essential to the issues or matter at hand. A post-conviction motion will be sufficient if it alleges within the four corners of the document itself the five "w's" and one "h", that is, who, what, where, when, why and how. As to the "who" prong the motion indicated three names of key witnesses that the jury did not have the opportunity to hear their testimonies(R47:48) As to the "why" and "how" prongs, the motion indicates the reason the witnesses are important is because McPherson, Prince and Shannon's exculpatory statements would have

been critical to McAlister's defense, as the crux of the state's case was the testimonies of its Two primary witnesses, Waters and Jefferson.(R47:1-4)(R47:5) As to the "what", "where" and "when" prongs, the motion indicates that the facts that can be proven are that in March 2006 McPherson states, and from January 4, 2006-May 25, 2007 Prince states,and on December 28, 2004 Shannon states Waters and Jafferson informed them that they were lying on McAlister to obtain a plea agreement from the district attorny. **State V. Allen**, 2004 WI 106, P9, 274 Wis.2d 568, 682 N.W.2d 433. The defendant also asserts that, the post-conviction Court erroneously exercised its discretion by: Assessing the credibility of defendant's three affidavits in support of his motion, from a cold record. The general rule is that credibility determinations are resolved by live testimony. see **Honeycrest Farms, Inc. V. A.O. Smith Corp.**, 169 Wis.2d 596, 604, 486 N.W. 2d 539(Ct. App. 1992) Therefore the defendant further contends, that the real controversy has not been fully tried. see **State V. Hicks**, 202 Wis.2d 150,160, 549 N.W.2d 435(1996). "[T]he real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial.**State V. Maloney**, 2006 WI 15,¶14n.4, 288 Wis.2d 551, 709 N.W.2d 436(citation omitted). The plaintiff-respondent contends that, McAlister's newly-discovered evidence claim fails for two reasons. First, the information offered in the defendant's supporting affidavits at most would provide some additional evidence that Waters and Jefferson had lied at McAlister's trial to curry favor with the State and benefit themselves in the context of their own prosecutions for the robberies at issue. Further contending that, that theory, however, already was the bedrock of McAlister's defense. (State's brief at P.8) Both men were cross-examined about their willingness to lie to avoid incarceration, as well as the plea agreements they recieved for their testimony.(R71:121-22, 127-31; R72:42, 45-54) When Waters denied receiving any cocessions from the state for his testimony,

the parties had the Court read a stipulation that proved otherwise, showing that Waters had been untruthful.(R42:3; R72:17-18). The defendant asserts, although Waters and Jefferson was vigorously cross-examined about their willingness to lie to avoid incarceration. More importantly, the defendant asserts that, all of the vigorous cross-examination about their willingness to lie to avoid incarceration, was concerning their willingness to "lie in the past" to avoid incarceration.(R71:108-131, 135-153) Waters testified that he had lied in the past to avoid incarceration, but he was testifying truthfully at McAlister's trial.(R71:135-153) Therefore, contrary to the Plaintiff-respondant claim that, the information offered in the defendant's supporting affidavits at most would provide some additional evidence that Waters and Jefferson had lied at McAlister's trial. The defendant's newly discovered evidence confirms the fact that, Waters and Jefferson not only lied in the past to avoid incarceration, but that they were presently lying at McAlister's trial to avoid incarceration.

The plaintiff-respondant claim that, the defendant's newly discovered evidence is merely cumulative,(state brief p 8) lacks arguable merit. The fact that Waters and Jefferson was lying about McAlister's involvement was neither conceded by the state at trial nor "established by exisiting evidence" **Washington V. Smith**, 219 F.3d 620, 634(7th Cir. 2000)(citition omitted) see **Wilson V. Plank**, 41 Wis. 94(1876). This makes McPherson, Prince and Shannon testimonies affirmative and corroborating evidence on the critical disputed issue of whether McAlister in fact was involved in these crimes, not merely cumulative evidence of a conceded or previously established fact **Washington V. Smith**, supra; **Wilson**, supra.

II.

THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN RULING THE DEFENDANT'S AFFIDAVITS WAS NOT ADEQUATELY CORROBORATED.

The post-conviction Court erroneously exercised its discretion when ruling that: I do believe this is a form of recantation.

its not exactly recantation after the fact, but it is a statement to the contrary of what they testified to, allegedly made, if it was made, to these persons who have given affidavits. (R76:29-30) I do not believe that there is any new feasible motive for the false statements. That motive was there, it was argued. And I don't believe that there are any circumstantial guarantees of trustworthiness to what essentially is a recantation in reverse. So I don't believe that the criteria of **McCallum** have been met.(R76:29-30)

The defendant contends that, if the affidavits are deemed recantations. The defendant asserts that, the three affidavits in support of his motion are adequately corroborated by other newly discovered evidence. The Supreme Court of Wisconsin explained: The rule has been, and remains, that recantation testimony must be corroborated by other newly discovered evidence. **State V. McCallum**, 198 Wis.2d 149, 159-60, 542 N.W.2d 184(1995).

III.

THE POST-CONVICTION COURT ERRONEOUSLY EXERCISED ITS DISCRETION BY APPLYING THE WRONG LEGAL STANDARD WHILE DETERMINING WHETHER MCALISTER SHOULD BE PERMITTED TO HAVE AN EVIDENTIARY HEARING.

The post-conviction Court erroneously exercised its discretion by applying the wrong legal standard, when determining that there was not a reasonable probability of a different outcome. The Circuit Court stated that: "I don't believe that this information provides the--not assurance, but provides a reason that there would be a reasonable probability that a different result would be reached at this trial". And therefore, your motion is denied.(R76:30) An exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion. **State V. Martinez**, 150 Wis.2d 62, 71, 440 N.W.2d 783, 787(1989). McAlister contends that, the Circuit Court employed

the wrong legal standard. The defendant asserts that, in determining whether there is a reasonable proabbility of a different outcome, the Circuit Court must determine whether there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt. **State V. Krieger**, 163 Wis.2d 241, 255, 471 N.W.2d 599(Ct.App. 1991)

Finally, the defendant asserts that, the three affidavits are admissions against their own interest makes it more credible, not less. cf., Wis Stat.§908.045(4).

CONCLUSION

For these reasons, and for those in his opening brief, McAlister asks that the Court reverse the order denying his post-conviction motion, vacate the judgement of conviction, and remand with directions to grant
him a new trial.

Dated at Fox Lake, Wisconsin. September 9, 2015

Respectfully submitted,

David McAlister Sr. Pro se.

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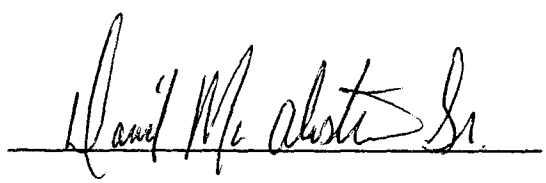
RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b)and(c) for a reply brief produced with a proportional serif font. The length of this brief is 1,358 words.

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.



CERTIFICATE OF MAILING

I hereby certify pursuant to Wis Stat. (Rule) 809.80(4) that, on September 9, 2015, I Caused 3 copies of the Reply Brief 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