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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2014AP2561
(Racine County Case 2005CF324)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID MCALISTER, SR.,

Defendant-Appellant-Petitioner.

On Petition for Review of a Decision of the Court of Appeals, District II, Affirming an Order of the Circuit Court for Racine County, the Honorable Emily S. Mueller, Circuit Judge, Presiding

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PETITION FOR REVIEW

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PETITION FOR REVIEW

David McAlister, Sr., by *pro bono* counsel, respectfully petitions this Court pursuant to Wis. Stat. §808.10 and (Rule) 809.62, to review the decision of the Wisconsin Court of Appeals, District II, dated August 10, 2016, affirming the final Order denying McCalister's post-conviction motion, entered in the Circuit Court for Racine County, the Honorable Emily S. Mueller, Circuit Judge, presiding. McAlister also seeks review of the Court of Appeals' Order of March 3, 2017, summarily denying his timely filed motion for reconsideration.

ISSUES PRESENTED FOR REVIEW

1. The central issue at trial was whether McAlister participated in the charged robberies. The state's evidence on that point consisted entirely of the allegations of two confessed participants seeking to mitigate the consequences of their own misconduct. The jury knew that the state's witnesses had a

motive to falsely accuse McAlister but those witnesses denied under oath having done so.

Under these circumstances, is newly discovered evidence from three separate witnesses swearing that the state's witnesses admitted prior to trial that they intended to falsely accuse McAlister "cumulative" and "merely tend to impeach the credibility of witnesses" such that it could not support a newly discovered evidence claim?

The circuit court denied McAlister's *pro se* due process challenge based on newly discovered evidence, concluding without a hearing that the affidavits had "limited credibility." On his *pro se* appeal, the Court of Appeals affirmed on different grounds, concluding that the state's witnesses' admissions to actually falsely accusing McAlister were "mere[] impeach[ment]" and "cumulative" to evidence that they had a motive to falsely accuse him.

The Court of Appeals summarily denied the reconsideration motion filed by *pro bono* counsel. Judge Hagedorn concurred, however, admitting that the Court's original rationale was legally invalid. He nonetheless concluded that the circuit court had the discretion to find that the affidavits were incredible without a hearing and that they thus would not create a reasonable probability of a different result.

2. Whether the allegations of McAlister's §974.06 motion were sufficient to require a new trial and therefore an evidentiary hearing on his claim.

The circuit court denied McAlister's motion without a hearing and the Court of Appeals affirmed, albeit on other grounds.

STATEMENT OF CRITERIA RELIED UPON FOR REVIEW

Similar to a case that this Court summarily reversed and remanded for a hearing earlier this year, the lower court decisions in this case reflect errors that are far too common, especially in *pro se* cases, in applying post-conviction standards for assessing newly discovered evidence claims. *See* ***State v. Jerry Simone Wilson***, Appeal No. 2013AP2590, Order dated Feb. 15, 2017 (petition granted, summarily reversed in part, and remanded for hearing)

Undersigned counsel's comments in his amicus brief supporting the petition in ***Wilson*** apply equally here:

> [Counsel] receives 10-15 letters and phone calls from inmates every week seeking advice regarding post-conviction motions of various types. One of the most common questions concerns failures by the lower courts to properly apply existing and controlling legal standards for assessing a reasonable probability of a different result when a *pro se* inmate has filed a newly discovered evidence motion. From counsel's own review of many such cases, the types of errors committed by the lower courts in Wilson's case are symptomatic of a broader failure by the lower courts to either understand or properly apply controlling standards in post-conviction motions, particularly in *pro se* cases. As such, review by this Court - or, alternatively, summary vacation of the Court of Appeals' decision and remand for reconsideration under the proper standards - is necessary to reinforce existing standards.

Amicus Brief of WACDL in ***State v. Jerry Simone Wilson***, Appeal No. 2013AP2590, at 1-2.

The decisions below reflect confusion on a number of issues regarding application of the newly discovered evidence

standards, confusion that only this Court can remedy.

Even "Mere Impeachment" Can Be Newly Discovered Evidence

The Court of Appeals' decision rests on the expansion and misinterpretation of a legal principle that no longer is viable even as originally intended 50 years ago. *Compare* ***Greer v. State***, 40 Wis.2d 72, 78, 161 N.W.2d 255 (1968) ("mere impeachment" evidence insufficient for newly discovered evidence), *with* ***State v. Plude***, 2008 WI 58, ¶¶38-41, 310 Wis.2d 28, 750 N.W.2d 42 (granting new trial on newly discovered evidence grounds); *see* ***id.*** ¶47 ("Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial," citing ***Birdsall v. Fraenzel***, 154 Wis. 48, 52, 142 N.W. 274 (1913)). *See* also ***United States v. Bagley***, 473 U.S. 667 (1985) (prosecutor's withholding of material impeachment evidence violates due process).

While the concurring judge below acknowledged the Court of Appeals' error in this regard (App. 7), the majority did not, thus demonstrating the need for guidance from this Court.

Indeed, the lower courts continue to rely on ***Greer*** and its progeny inappropriately to deny relief. *E.g.*, ***State v. Alexander***, 2016 WI App 18, ¶27, 367 Wis.2d 349, 876 N.W.2d 178 (unpublished; App. 17-23), *rev. denied*, 2016 WI 78, 371 Wis. 2d 608, 885 N.W.2d 379; ***State v. Brooks***, 2014 WI App 110, ¶11, 357 Wis.2d 721, 855 N.W.2d 903 (unpublished; App. 24-26); ***State v. Franklin***, 2014 WI App 83, ¶21, 355 Wis.2d 578, 851 N.W.2d 471 (unpublished; App. 27-31).

Only this Court can end the lower courts' misinterpretation and misapplication of ***Greer***. Until it does, any number of deserving and potentially innocent defendants will be denied relief.

Admissions of McAlister's Non-Involvement Is Affirmative Evidence of Innocence, Not "Mere Impeachment" and Not "Cumulative"

The Court of Appeals' "mere impeachment" theory, as applied below and in so many other cases, also conflicts with controlling precedent because the admissions by the state's star witnesses that McAlister was not involved in the crimes were not merely impeachment, but affirmative evidence of McAlister's innocence. *E.g.*, ***Vogel v. State***, 96 Wis.2d 372, 383-84, 291 N.W.2d 838 (1980) (witness's inconsistent statement is admissible for its truth, not merely as impeachment). *See* ***State v. Davis***, 2011 WI App 147, ¶ 24, 337 Wis.2d 688, 808 N.W.2d 130 ("Reed's testimony [that Henderson admitted Davis was not involved] directly contradicts Henderson's trial testimony. Henderson's statements to Reed do not merely serve as impeachment evidence, but rather as affirmative evidence of Davis's innocence." Citing ***Vogel***, *supra*).

The fact that the admissions are affirmative evidence of innocence also undermines the Court of Appeals' conclusory assertion that the admissions that the witnesses in fact did frame McAlister are "cumulative" given the evidence that they had a possible motive to do so. Evidence is cumulative when it "supports a fact established by existing evidence." ***State v. Thiel***, 2003 WI 111, ¶78, 264 Wis.2d 571, 665 N.W.2d 305 (citation omitted). At the same time, testimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent. ***Wilson v. Plank***, 41 Wis. 94, 98-99 (1876).

The newly discovered evidence consisted of interlocking admissions by the state's star witnesses that, contrary to their

trial testimony, McAlister was not involved in the crimes for which he was convicted. McAlister's lack of involvement in those crimes was not "established by existing evidence," and no other evidence showed that the state's witnesses had admitted his non-involvement. Other evidence from which the jury could conclude that the witnesses had a history of lying on other matters and a motive to lie, and that they thus *may* have lied about McAlister's involvement, did not "establish[]" that they in fact acted on that motive here.

Accordingly, evidence consisting of their own interlocking admissions that they had perjured themselves and that McAlister is innocent is affirmative evidence of McAlister's innocence, not cumulative. *E.g.*, ***Thiel***, *supra*, ¶78 (quoting ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000), for proposition that additional witnesses corroborating defendant's alibi "would have added a great deal of substance and credibility" to that alibi and are not cumulative); ***Crisp v. Duckworth***, 743 F.2d 580, 585 (7th Cir. 1984) (finding that "[h]aving independent witnesses corroborate a defendant's story may be essential" and "testimony of additional witnesses cannot automatically be categorized as cumulative").

As the Supreme Court has emphasized, someone's personal admission of wrongdoing (such as the state witnesses' admissions to falsely accusing McAlister here) is a uniquely damaging piece of evidence against him:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so

> much so that we may justifiably doubt its ability to put them out of mind even if told to do so." ***Bruton v. United States***, 391 U.S., at 139–140, 88 S.Ct., at 1630 (WHITE, J., dissenting). *See also* ***Cruz v. New York***, 481 U.S., at 195, 107 S.Ct., at 1720 (WHITE, J., dissenting) (citing ***Bruton***). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision.

Arizona v. Fulminante, 499 U.S. 279, 296 (1991).

While ***Fulminante*** dealt with admission to a crime by a defendant, there is no reason to believe that a personal admission by a state's witness to perjury and to framing an innocent person would have any lesser impact on a jury, even where evidence of a possible motive might not have much effect.

Again, the lower court's confusion regarding what evidence may be deemed "cumulative" calls out for guidance by this Court.

"Reasonable Probability of a Different Result"

Although the concurring judge below confessed error on the "mere impeachment" theory, he nonetheless concluded that the circuit court implicitly deemed McAlister's new witnesses to be "inherently unbelievable," albeit without so much as a hearing, that this "finding" was not unreasonable, and that their evidence accordingly would not create a reasonable probability of a different result as required for reversal on newly discovered evidence grounds. (App. 7).

This conclusion likewise calls for Supreme Court review on a number of levels since it reflects deep-seated confusion

regarding the applicable legal standards.

Incredibility as Basis to Deny Newly Discovered Evidence Motion

On a factual level, the circuit court's written order (drafted by the prosecutor (R76:30; App. 15)) stated not that the new witnesses were incredible, but that they "have limited credibility." (R52; App. 8). As this Court held in ***State v. McCallum***, 208 Wis.2d 463, 474, 561 N.W.2d 707 (1997), however, the proper standard is not whether the trial court believes the recantation to be more or less credible than the original testimony but "whether there is a reasonable probability that a jury, looking at both the [former testimony] and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 474 (emphasis added). "Less credible is far from incredible." ***Id.*** at 475. [1]

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[1] In its oral comments, the circuit court only directly addressed one new affidavit, concluding that it is "inherently not believable" because the affiant admitted to helping a state's witness to concoct his false testimony. (R76:29; App. 14). Yet, that suggestion is wholly unrealistic and unreasonable because, if admitting to misconduct rendered testimony "inherently unbelievable," then the state's witnesses necessarily were inherently incredible as well since they likewise admitted to crimes.

The circuit court also applied the wrong legal standard. The Court cannot reject the testimony of new witnesses merely because the Court may choose to disbelieve them or because it may find the witnesses at the trial more believable. ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. Concurring). Rather, the only question for the Court is whether witness testimony creating a reasonable probability of a different result *could* be credited by a reasonable jury sufficient to create a reasonable doubt. Because the evidence here is not incredible as a matter of law, i.e., "in conflict with ... nature or with fully established or conceded facts," ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974), the jury must resolve credibility disputes, not the Court. ***Id.***; *see* ***Jenkins***, 2014 WI 59, ¶64. *See also* ***State v. Brown***, 96 Wis.2d 238, 247, 291 N.W.2d 528 (1980) ("Unless a witness's testimony is deemed incredible as a matter of law, the credibility of the witness is irrelevant in the trial court's determination of whether the proffered third-party statement should be admitted." (footnote omitted)).

Clarification of Standard of Review

Under Wisconsin law, newly discovered evidence is a matter of due process. *E.g.*, ***State v. Love***, 2005 WI 116, ¶43 n.18, 284 Wis.2d 111, 700 N.W.2d 62. Upon a showing that the evidence is new, material, and not merely cumulative, and that the defendant was not negligent in seeking the evidence, the question becomes whether "a reasonable probability exists that a different result would be reached in a trial." ***Id.***, ¶44 (citation omitted). "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.'" ***Id.***, quoting ***McCallum***, 208 Wis.2d at 474.

The standard of review, however, is unclear and this Court's pronouncements inconsistent. *Compare* ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60 (erroneous exercise of discretion), *with* ***In re Commitment of Sorenson***, 2002 WI 78, ¶25, 254 Wis. 2d 54, 646 N.W.2d 354 ("Due process determinations are questions of law that we decide *de novo*."). Indeed, although this Court has expressly stated that the "reasonable probability of a different result" prong presents an issue of law reviewed *de novo*, ***State v. Plude***, 2008 WI 58, ¶33, 310 Wis.2d 28, 750 N.W.2d 42, it later cited that very case as supporting "erroneous exercise of discretion" review of that prong, ***Avery***, 2013 WI 13, ¶32. *See also* ***Thiel***, 2003 WI 111, ¶¶23-24 ("reasonable probability of a different result" on ineffectiveness claim is reviewed *de novo*).

Consistency and logic dictate application here of the same *de novo* standard elsewhere applicable to the "reasonable probability" analysis. However, we do not now even have consistency among cases addressing newly discovered evidence. Supreme Court review accordingly is necessary to provide that

consistency.

Corroboration for Newly Discovered Recantation

The Court of Appeals chose not to address whether the pretrial and thus pre-testimonial admissions of the intent to frame McAlister were "recantations" requiring corroboration under ***McCallum***, 208 Wis.2d at 473-74 (witness' recantation must be corroborated by other newly discovered evidence) (App. 3-4). However, the circuit court argument on McAlister's motion focused almost entirely on that requirement and reflects substantial confusion by both the parties and the circuit court. (R76).

The general rule under ***McCallum***, is that newly discovered recantation evidence must be corroborated by other newly discovered evidence. 208 Wis.2d at 476-78. As McAlister argued repeatedly in the circuit court, he satisfied this requirement because the evidence provided by each of the three newly discovered witnesses corroborated that provided by the others regarding the state's witnesses' admissions to framing McAlister, thus satisfying this requirement (R76:17, 18, 27).

The prosecutor and circuit court, however, overlooked that showing, instead focusing on whether McAlister satisfied an alternative form of corroboration approved by ***McCallum*** and concluding that he did not. Specifically, ***McCallum*** held that one way to satisfy the corroboration requirement is if the defendant presents newly discovered evidence of "a feasible motive for the initial false statement " and, "there are circumstantial guarantees of the trustworthiness of the recantation," 208 Wis.2d at 477-78. The motive of the state's witnesses to frame McAlister was known at trial and therefore not newly discovered (*see* R76:28-30; App. 13-15).

However, failing to satisfy one alternative means of

showing corroboration is irrelevant where, as here, McAlister satisfied a different alternative in the form of multiple affidavits from multiple witnesses to statements by both of the state's witnesses confessing to framing McAlister, all of which were newly discovered and all of which corroborate each other. Again, the confusion on this point reflected in the prosecutor's argument and the circuit court's finding on this point suggests a far broader problem that only this Court can clarify and correct.

* * *

The lower court decisions reflect a great deal of confusion regarding the applicable legal standards for assessing a newly discovered evidence claim. Moreover, in counsel's experience, that confusion is not limited to these particular courts or to Mr. McAlister. Given the nature of these claims, which directly call into question the issue of guilt or innocence, proper application of these standards is necessary to insure that the courts remain a bulwark against conviction and incarceration of the innocent. Review is appropriate because only this Court can bring clarity and consistency back to the evaluation of these cases. Wis. Stat. (Rule) 809.52(1r)(c) & (d).

STATEMENT OF THE CASE

Having been caught for their own wrongdoing and offered plea deals by the state, Alphonso Waters and Nathan Jefferson provided the promary evidence against David McAlister, Sr., regarding three robberies. Based on their testimony, a jury found McAlister guilty in 2007 of two of those robberies but acquitted him of the third. (*See* R76:20-22; App. 10-11 (circuit court quoting state's closing argument)).

The state's court of appeals brief adequately summarizes the evidence for purposes of this petition:

> In exchange for Waters' and Jefferson's testimony, the State agreed to "reduce the exposure for both of the witnesses, and once the exposure was reduced, make a recommendation as to what the ultimate sentence should be" (72:44-46).
>
> Waters was the State's first witness. On cross-examination, defense counsel asked Waters about several incidents in which he had either lied to the police about his involvement in a particular crime or used a false name to escape detection, and Waters admitted that, in those instances, he had been willing to lie to keep himself out of jail (71:121-22, 127-31). Waters refused, however, to acknowledge the consideration he had received for his testimony (71:151-53; 72:46). The next day, the court read to the jurors a joint stipulation prepared by the parties, informing them that the State had agreed to reduce Waters' exposure and recommend less prison time, and that Waters knew about the agreement before he testified (42:3; 72:17-18).
>
> When Jefferson testified, he acknowledged his plea agreement with the State (72:42, 45-49). Defense counsel cross-examined Jefferson extensively about his negotiations with the State (72:45-49). Jefferson also admitted that he had originally lied to investigating officers about his involvement in one of the robberies because he didn't want to go to jail (72:50-51). Only when he was convinced that the police had sufficient evidence to convict him of that robbery did Jefferson, hoping for leniency, tell them about his role in the robbery and implicate McAlister (72:52-54).

State's Court of Appeals Brief at 2-3.

After an unsuccessful direct appeal, McAlister learned that, not only did Waters and Jefferson have a motive to falsely accuse him, as was brought out at trial, but they in fact had

admitted to others prior to trial that McAlister was *not* involved in the robberies and that they were only accusing him to mitigate their own punishment. He therefore filed a *pro se* motion under Wis. Stat. §974.06 on the grounds that the newly discovered evidence of innocence gave him a due process right to a new trial (R46).

Again, the state's summary suffices here:

> On May 19, 2014, McAlister filed another postconviction motion, this time seeking a new trial based on newly-discovered evidence "that the primary witnesses against [him] conspired to frame him to obtain favor from the State" (46:1). In support of his motion, McAlister submitted affidavits from three men who claimed that Waters and Jefferson had confessed to lying about McAlister's participation in the robberies (47; 48).
>
> According to his affidavit, Wendell McPherson was in prison with Alphonso Waters before he testified at McAlister's trial (47:1-4). Waters allegedly told McPherson about the plea agreement he had with the State and that he was afraid the State would find out that he and Jefferson were lying about McAlister's involvement in the robberies (47:2). Confronted with a video recording showing him committing one of the robberies, Waters said he asked the police for a deal (47:2). Waters told McPherson that "he needed to come up with a lie so that he can throw somebody under the bus and that's when David McAlister entered his mind" (47:2). When McPherson asked why he was going to lie about McAlister's part in the robberies, Waters told him that "[h]e didn't like Mr. McAlister and he wanted to get Mr. McAlister out of the picture" (47:3). Waters also said he'd written to Jefferson and told him "exactly what to say because he had made a plea deal and he want they statements to collaborate so Mr. Jefferson can get a

plea deal as well" (47:3). Finally, McPherson stated that he helped Waters prepare for McAlister's trial by helping Waters "rehearse[] the lies that he testified to so he would be believable" (47:3).

The second affidavit was from Corey Prince (47:5). Prince stated that he was in the Racine County Jail with Nathan Jefferson in 2006 and 2007, before Jefferson testified at McAlister's trial (47:5). During that time, Prince claimed that Jefferson told him that Alphonso Waters, who was also known as "Bird," had instructed him on "exactly what to say in regards to their pending case" and to lie about "the older man" being involved "so that they could receive a shorter sentence" (47:5). Prince alleged that several years later, in 2012, he was in Waupun Correctional Institution with McAlister when he overheard McAlister complaining that "Nate" and "Bird" had set him up by lying and implicating him in robberies they had committed (47:5). At that point, Prince introduced himself to McAlister and told him about the conversation(s) he'd had with Jefferson back in 2006-07 (47:5).

The third affidavit came from Antonio Shannon, who stated that he and his friend, Amanda, had actually seen Jefferson commit one of the robberies at issue, which had taken place at an auto loan business (48:1). Two years later, Shannon happened to be in the Racine County Jail with an inmate who turned out to be Jefferson (48:1). They talked and learned that they both knew Amanda (48:1). When Jefferson later confessed to the auto loan robbery [fn. omitted], Shannon told Jefferson that he'd seen him running from the scene (48:1). Jefferson allegedly said that he had "an out[,]" but it would only work if "Bird" said the same thing (48:1). The next day, Jefferson told Shannon that he had a plea deal "if he took the stand against someone he said was not involved in the robbery" (48:2).

> On September 29, 2014, the circuit court heard argument on whether McAlister's motion warranted an evidentiary hearing (76:5-6). Ultimately, the circuit court denied McAlister's motion without an evidentiary hearing, finding: that the affidavits in support of the motion were "inherently not believable[;]" that the allegations in the affidavits were essentially recantations without a new feasible motive for the original false statements or any circumstantial guarantees of trustworthiness; and, that the information in the affidavits did not demonstrate a reasonable probability that a different result would be reached at trial (see 52; 76:29-30[; App. 8, 14-15]).

State's Court of Appeals Brief at 4-6.

The Court of Appeals rejected McAlister's *pro se* appeal on August 10, 2016 (App. 1-5), although holding simply that the new evidence was "cumulative" and, as impeachment evidence, insufficient as a matter of law (App. 5). Specifically, that court concluded that

> the three affidavits McAlister submitted in support of his postconviction motion were merely an attempt to retry the credibility of Waters and Jefferson, whose credibility was well-aired at trial. Evidence does not warrant a new trial when, as here, it would merely tend to impeach the credibility of witnesses. ***State v. Machner***, 92 Wis. 2d 797, 806, 285 N.W.2d 905 (Ct. App. 1979). Because the three affidavits were cumulative, they did not satisfy the requirements for newly discovered evidence. [Citation omitted]. Therefore, McAlister did not allege sufficient material facts that, if true, would entitle him to the relief sought, i.e., a new trial. [Citation omitted].

(App. 5).

On March 3, 2017, the Court of Appeals summarily denied

pro bono counsel's timely motion for reconsideration (App. 6-7). While Judge Hagedorn, concurring, admitted that the court had applied the wrong legal standards, he nonetheless concluded that the circuit court could have legitimately found the new witnesses to be incredible without a hearing and therefore could conclude that the new evidence would not create a reasonable probability of a different result (App. 7).

ARGUMENT

REVIEW IS APPROPRIATE TO REMEDY WIDESPREAD CONFUSION AMONG THE LOWER COURTS CONCERNING THE LEGAL STANDARDS FOR ASSESSING NEWLY DISCOVERED EVIDENCE CLAIMS

McAlister's is a prototypical case in which the actions of those seeking to avoid the consequences of their own misconduct risk the conviction and punishment of an innocent person. *See, e.g.*, ***On Lee v. United States***, 343 U.S. 747, 757 (1952) (use of such informers "may raise serious questions of credibility"); ***United States v. Bernal-Obeso***, 989 F.2d 331, 334 (9th Cir. 1993) ("Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison"); ***Dudley v. Duckworth***, 854 F.2d 967, 972 (7th Cir. 1988) ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses"). Rarely do such witnesses admit that they are framing an innocent person, and when they do, we should not blithely dismiss such an admission as meaningless. *See, e.g.*, ***Fulminante***, 499 U.S. at 296 (discussing significant impact of an admission of guilt on the jury).

Here, McAlister satisfied the requirements for a hearing on his newly-discovered evidence claim, having presented evidence that he was not simply unfairly convicted, but that he is factually

innocent of the charges against him. The lower courts nonetheless denied him that hearing based on a variety of findings that reflect much confusion regarding the applicable legal standards, a degree of confusion that undersigned counsel knows from personal experience is widespread. Review accordingly is appropriate, not simply because the erroneous rulings below risk the continued incarceration of an innocent man, but because broader confusion among the lower courts concerning the applicable legal standards risks continued incarceration of many more innocent people.

A. Applicable Legal Standards

The general standards for a newly discovered evidence claim are well-settled if not always well-understood:

> 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 Wis.2d 374, 746 N.W.2d 590.

"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.'" ***State v. Love***, 2005 WI 116, ¶44, 284 Wis.2d 111, 700 N.W.2d 62 (citation omitted). The defendant, moreover, 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*.

Finally, as this Court has recognized, a court cannot reject the testimony of witnesses not presented at the original trial merely because the court may choose to disbelieve them or because the court may find the witnesses at the trial more believable. ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. Concurring). Rather, the only question for the court is whether witness testimony creating a reasonable probability of a different result *could* be credited by a reasonable jury sufficient to create a reasonable doubt. So long as the evidence is not incredible as a matter of law, i.e., "in conflict with ... nature or with fully established or conceded facts," ***Rohl v. State***, 65 Wis.2d 683, 695, 223 N.W.2d 567, 572 (1974), it is the jury that must resolve credibility disputes, not the Court. ***Id.***; *see* ***Jenkins***, 2014 WI 59, ¶64.

Newly discovered evidence is a matter of due process. *E.g.*, ***Love***, 2005 WI 116, ¶43, n.18.

"If the motion raises sufficient facts that, if true, show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing" unless "the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Balliette***, 2011 WI 79, ¶18, 336 Wis.2d 358, 805 N.W.2d 334 (citation and internal quotation omitted). Sufficiency of the motion is a question of law, which this Court reviews *de novo*. *Id.*

B. McAlister's Motion Satisfies the Requirements for Newly Discovered Evidence

Applying the required standards, McAlister's motion alleges facts that, if true, show that he is entitled to relief under the due process standard for newly discovered evidence. Neither the state nor the lower courts have suggested that McAlister failed to satisfy the first three requirements. Evidence of the state's witnesses' admissions to having framed him for something he did not do was new since he did not have that information at trial. Nor is there any suggestion that he or his trial counsel were negligent in not finding the evidence earlier. There likewise is no suggestion that admissions by the only witnesses tying McAlister to the crimes for which he was convicted that they framed him and that he was not actually involved are not material.

Rather, the only claimed defects in McAlister's motion are that (1) "mere impeachment" cannot form the basis for a newly discovered evidence motion, (2) admissions by the state's two critical witnesses that McAlister was not involved in the crimes but they would frame him anyway would be "cumulative" to evidence that, despite their testimony under oath at trial that they did not frame him, they had a motive to do so, and (3) confessions by the state's critical witnesses that they committed perjury by claiming that McAlister was involved even though he was not could not have created a reasonable probability of a different result at trial.

As discussed in the Statement of Reasons for Granting Review, *supra*, the lower court resolution of each of these issues reflects a high level of confusion regarding the controlling legal standards and their application, confusion that only this Court can remedy. The discussion there also demonstrated why the lower court holdings on each of these issues was simply wrong.

Rather than waste the Court's time repeating that showing, McAlister will refer the Court's attention to that discussion.

CONCLUSION

For these reasons, McAlister asks that the Court grant review and set this matter for full briefing on the merits.

Dated at Milwaukee, Wisconsin, March 27, 2017.

Respectfully submitted,

DAVID MCALISTER, SR.,
Defendant-Appellant-Petitioner

HENAK LAW OFFICE, S.C.

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Rules 809.19(8)(b) and 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 5,327 words.

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Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the petition.

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Robert R. Henak

McAlister Pet. Rev.wpd