No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID McALISTER SR. - PETITIONER

Vs.

STATE OF WISCONSIN - RESPONDENTS

On Petition for a Writ of Certiorari to Review Decision of the Wisconsin Supreme Court Affirming a Decision of the Court of Appeals, District I I " et al. "

PETITION FOR WRIT OF CERTIORARI

David McAlister Sr. Pro se

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Questions Presented

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

1. Did the circuit court erroneously violate petitioner's right to due process when it applied an incorrect legal standard to newly discovered evidence?
2. Do the new evidence that prior to trial, the state's witness admitted that petitioner was not involved in the robberies and that they nonetheless intended to frame petitioner for them, insufficient to support a newly discovered evidence claim on the grounds that it " merely tends to impeach the credibility of witness" ?
3. Is the new evidence that petitioner as not involved in the robberies " cumulative" of evidence that the state witness had motive to falsely accuse him?
4. Are the pretrial admissions by the state's witness that petitioner was not involved in the robberies and that they nonetheless intended to frame him for them " recantations" requiring corroboration and, if so, are they adequately corroborated ?
5. Do the newly discovered pretrial admissions by the state's witness that petitioner in fact was not involved in the robberies create a reasonable probability of a different result?

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IN THE

SUPREME COURT OF THE UNITED STATES

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

State courts: The opinions of the supreme court of Wisconsin appears at appendix D to the petition and is reported at **State V. McAlister**, 2017 Wis Lexis 520

The opinion of the Wisconsin court of appeals appears at appendix A to the petition and is reported at **State V. McAlister** 2018 Wi 34, 380 Wis 2d 684, 911 N.W. 2d 77

The opinion of the Wisconsin circuit court appears at appendix B to the petition and is reported at **State v. McAlister**, 2014 AP 2561

JURISDICTION

State courts: The date on which the supreme court of Wisconsin decided my case was April 17th, 2018. A copy of that decision appears at appendix D

A timely petition for rehearing was thereafter denied on the following date: July 14th, 2018 and a copy of the order denying rehearing appears at appendix E.

The jurisdiction of this court is invoked under **28 U.S. § 1257 (a)**

Constitutional and statutory provisions involved

United State Constitution Amendment X I V

Wisconsin Constitution Amendment V I I I

Wisconsin Stat §974.06

Wisconsin Stat §974.06 (4)

Wisconsin Stat§ 908.01 (4) (a) 1

Statement of the case

A jury found David McAlister Sr. guilty of several crimes. Now, with sworn affidavits in hand, he asserts that he has newly discovered evidence that his accomplices planned in advance to lie on the stand during his trial to falsely implicate him. The Wisconsin Supreme Court ("majority") denies him an evidentiary hearing on his claim that he "was not "in fact, involved in the offenses for which he was convicted..... The issue, in this case is not whether McAlister's CONVICTION should be vacated, or whether he should receive a new trial. It is merely whether he should be afforded the opportunity for an evidentiary hearing on his post conviction motion.

Our system of law has always operated under the theory that it is better for ten guilty people to go free than one innocent to languish in prison See. **State V. Dubose**, 2005 WI 126, ¶ 51 n.1 285 Wis 2d 143, 699 N.W. 2d 582 (butler J. Concurring) **Furman V. Georgia**, 408 U.S 238, 367 n. 158 (1972) (Marshall J. Concurring) (quoting William O. Douglas, Forward to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957) See Also **In Re Winship**, 397 U.S. 358, 372 (1970) (Harlan J. Concurring). Yet, the majority opinion strays from the premise, favoring finality. What if McAlister's claims are true? What if his witnesses are credible? We will never know because the majority has short-circuited the process and there will be no hearing.

Not only does the majority misstep by favoring finality over a search for the truth, it also stumbles in three significant ways. First, by refusing to accept the facts alleged as true for purposes of determining whether McAlister is entitled to an evidentiary hearing, the majority deviates from our established case law. See **State v. Balliette**, 2011 Wi 79 ¶ 18, 336 Wis 2d 358, 805 N.W. 2d 334; **State v. Love**, 2005 WI 116, ¶¶ 54-55, 284 Wis. 2d 111, 700 N.W 2d 62. Second, it errs in determining that the new evidence is cumulative of that already presented. Third, it attempts to fit a square peg into a round hole by creating a false equivalency between recantation evidence and the alleged newly discovered evidence at issue here. Addressing them each in turn.

This case revolves around McAlister's claim that his accomplices lied on the stand during his trial. With his post conviction motion, McAlister presented to the circuit court the affidavits of three prison inmates-Wendell McPherson, Corey Prince, and Antonio Shannon.

Each of the three inmates averred that he had contact with one of McAlister's accomplices, Alphonso Waters or Nathan Jefferson prior to McAlister's trial. Most significantly, the affidavits indicate that Waters and Jefferson stated that they planned to lie in an effort to implicate McAlister.

A

The majority errs first by foiling to adhere to precedent. It denied McAlister a hearing when the facts accepted as true, indicate that McAlister is entitled to relief!

The question before us is whether McAlister is entitled to an evidentiary hearing, giving him the opportunity to establish that a reasonable probability exists that a different result would be reached at trial. At this stage of the proceedings, we must accept the facts alleged in McAlister's motion as true. See **Love**, 284 Wis 2d. 111, ¶ 54. For our purposes, it is not relevant whether the alleged newly discovered evidence is admissible or whether it is credible.

A court is not to base its decision solely on the credibility of the newly discovered evidence, unless it finds the new evidence to be incredible as a matter of law. **State V. Avery**, 2013 WI 13, ¶25,345 Wis 2d 407, 826 N.W2d 60. Testimony is incredible as a matter of law or patently incredible if it is in conflict with the uniform course of nature or with fully established or conceded facts. **State V. Vollbrecht**, 2012 WI 90, ¶28 n.18, 344 Wis2d 69, 820 N.W2d 443 (citation omitted)

¶83 **Love**, 284 Wis2d 111, presents facts very similar to those here. In Love, the defendant was convicted of armed robbery and subsequently filed a motion for a new trial based on newly discovered evidence.¶¶19, 21. "Love included an affidavit from Christopher Hawley, who claimed to have met another inmate, Floyd Lindell Smith Jr., while at Green Bay correctional Institution. Hawley averred that Smith admitted to robbing (the victim) and shared in-depth details regarding the incident." ¶21. The circuit court denied the motion without an evidentiary hearing.¶ 23 the Supreme Court remanded for an evidentiary

hearing.¶56. Like this case, Love turned on the reasonable probability prong of the newly discovered evidence test: The **Love** court accepted the facts as alleged in Love's post conviction motion as true for purposes of its analysis:

> Love's post conviction motion indicates that Hawley would testify That Love was not the assailant. Hawley will testify that Smith (Or if Love can get Smith to testify, then it would be Smith's Testimony that he) committed this crime. Whether that Testimony is ultimately admissible is not relevant for the court Purposes here. Whether that testimony is credible is not Relevant for the court's purposes here. It must be accepted As true.

Accepting Love's alleged facts as true, the court determined that Love was entitled to an evidentiary hearing. The court explained:

> If it is true, then the evidence against Love amounts to (the victim's) identification against another's assertion that Smith committed the crime. Thus, viewing the new evidence, particularly in light of the identification discrepancies, there is a reasonable probability that a jury, looking at both, would have a reasonable doubt as to Love's guilt.

The only material factual difference between this case and Love is the timing of the alleged statements- the affidavits here related to an admission of future perjury, while in **Love** the affidavits related to an alleged admission to a past crime.

In both cases, the affidavit was a fellow inmate. As in **Love** one would accept the alleged facts as true.

In his post conviction motion, McAlister alleged that "long after McAlister's direct appeal and after he filed his petition for writ of Habeas corpus, he learned that Corey Prince, Wendell McPherson and Antonio Shannon had information confirming that McAlister was not involved in any robberies and that the state's two key witnesses against him, Alphonso Waters and Nathan Jefferson had conspired to frame McAlister in order to obtain relief from their own sentences."

Instead of accepting McAlister's alleged facts as true, the circuit court here stated orally that the affidavits are "inherently not believable." In its written order, it likewise concluded that they "have limited credibility." The circuit court this went well beyond its role at this stage of proceedings, engaging in a personal,

subjective assessment of witness credibility rather than accepting the facts presented as true.

The majority turns a blind eye to the circuit court's error and again delves into the credibility of the affidavits' statements. In its misguided search for "circumstantial guarantees of trustworthiness," the majority laments that "the length of time that passed between McAlister's trial and the submission of the affidavits cuts against concluding that the affidavits are trustworthy." It further decries the "highly suspicious" nature of jailhouse statements made by those serving life sentences.

The inquiry goes beyond the court's role based on the procedural posture with which we are presented. Properly leaving a credibility determination for a later date, the court's only determination here should be whether the McPherson, Prince, and Shannon affidavits are incredible as a matter of Law. Justice Ann Walsh Bradley concluded that they are not. The statements are not so outlandish as to be in conflict with the "uniform course of nature" See **Vollbrecht**, 334 Wis2d 69, 28 n.18. Without an evidentiary hearing we simply do not know if the affidavits are credible. Accordingly, I would accept the alleged facts as true and determine that McAlister should be afforded the opportunity for an evidentiary hearing.

B

The majority errs next by determining that the newly discovered evidence is merely cumulative of that already presented. It reaches this conclusion because "the jury heard it all before." According to the majority, the alleged newly discovered evidence is "of the same general character and drawn to the same point for which proof was provided at trial, I.E that Jefferson and Waters lied to benefit themselves.

What was the "character" of the evidence offered? At trial, both Jefferson and Waters were cross examined regarding deals they made with the district attorney. In each case, the district attorney agreed to recommend less prison time in exchange for their testimony. This evidence could be certainly offer a Motive for Waters and Jefferson to lie and implicate McAlister, but it says nothing about whether Waters and Jefferson in fact conspired to frame McAlister.

In contrast, the affidavits of Prince, McPherson, and Shannon, if true offer a direct evidence that Waters and Jefferson conspired to lie. Direct evidence that

Jefferson and Waters planned to lie is of a "different general character than the circumstantial evidence of their motive to lie that was presented at trial." As McAlister aptly states in his brief, "evidence that Jefferson and Waters in fact conspired to frame McAlister is not cumulative to evidence that they had a motive to do so."

C

The majority's third error lies in its attempt to fit a square peg into a round hole by creating a false equivalency between recantation evidence and the alleged newly discovered evidence in this case.

Recantations are inherently unreliable. **State V. McCallum**, 208 Wis 2d 463,476,561 N.W.2d 707 (1997) (citing **Dunlavy V. Dairyland mut.Ins. Co.**, 21 Wis 2d 105,114,124 N.W2d 73 (1963).

> That there was no direct evidence of a conspiracy presented at trial was repeatedly highlighted by the prosecutor during closing argument. The state's closing argument was peppered with statements such as "there is no evidence they ever met and talked about it" and "there is no evidence they ever even talked." If true, the McPherson, Prince, and Shannon affidavits do provide such evidence.

"The recanting witness is admitting that he or she has lied under oath. Either the original sworn testimony or the sworn recantation testimony is false. "McCallum, 208 Wis2d at 476. This is the reason behind the corroboration requirement for recantation testimony. **Gehin V.Wis. Group Ins**. 2005 Wi 16, ¶98, 278 Wis 2d 111, 692 N.W2d 572.

Contrary to the majority's assertion, the evidence at issue here is not akin to recantation evidence. The alleged "recantation" is not the product of the witnesses who are alleged to have lied on the stand, Jefferson and Waters. Rather, the alleged "recantation" statements are from three individuals who did not previously testify in this case. By definition, a recantation must consist of the witness withdrawing or renouncing prior testimony. See. **McCallum**, 208 Wis 2d at 476. Neither Waters nor Jefferson had submitted an affidavit recanting his trial testimony.

Consequently, the logic of the corroboration rule does not hold here. As we explained in McCallum, in the recantation situation "the recanting witness is admitting that he or she has lied under oath. Either the original sworn testimony or the sworn recantation testimony is false." **McCallum**, 208 Wis2d at 476. Here,

the alleged "recantations" of Jefferson and Waters were not made under oath. There is no sworn "recantation" testimony from the "recanters" The "either/or" situation described in McCallum is not present here because Jefferson and Waters each made only one statement under oath-his trial testimony.

The statements at issue are better characterized as prior inconsistent statements rather than a "recantation". A prior inconsistent statement in not "inherently unreliable" as is a recantation. To the contrary, a prior inconsistent statement is reliable enough to constitute a non-hearsay statement. See **Wis Stat. § 908.01(4) (a) 1**. The majority's attempt to force the evidence here within the category of "recantation" evidence is simply unconvincing.

II

If a **Wis State. §974.06** motion raises sufficient facts that, if true show that the defendant is entitled to relief, the circuit court must hold an evidentiary hearing. **Balliette**, 336 Wis2d 358, ¶18. The sworn affidavits assert that witnesses lied and McAlister maintains he was not involved in the offense for which he was convicted. Accepting the facts as alleged in McAlister's motion as true, I therefore would reverse the court of appeals and remand to the circuit court for an evidentiary hearing.

Accordingly, I respectfully dissent.
I am authorized to state that Justice Shirley S. Abrahamson joins this dissent.

REASON FOR GRANTING THE PETITION

The Wisconsin Supreme Court has overlooked controlling legal precedent and has misconstrued a controlling or significant fact appearing in the record. **State ex rel. Three unnamed petitioners V. Peterson**, 2015 WI 103, 20, 365 N.W2d 351, 875 N.W 2d 49 (quoting Wis S. Ct. I.O.P II J.)

The court decision also conflicts with controlling precedent contrary to its decision and relevant facts.

Cumulative Evidence

LAW –While "evidence which is merely cumulative is not grounds for a new trial" the court overlooks its recognition that evidence is cumulative only when the evidence "supports a fact established by existing evidence," **State V. Thiel**, 2003 Wi 111,¶ 78, 264 Wis2d 571, 665 N.W2d 305 (quoting with approved **Washington V. Smith**, 219 F.3d 620,634 (7th Cir. 2000) (emphasis added). A fact not "established" in this sense when it remains disputed.

Wilson V. Plank, 41 Wis. 94 (1876), did not hold that the test is whether the evidence "tends to prove propositions of fact which were litigated at trial." Instead, Wilson held that the quoted language "is not the sense in which the term is employed in the [newly discovered evidence] rule." 41 Wis at 98. Rather, "evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative within the true meaning of the rule on this subject.

This court's citation to how "the [United States Supreme] court has defined cumulative evidence" in, **Southard V. Russell**, 57 U.S 547,554 (1853) in fact is to a litigants brief. The decision does not begin until page 556.

The Wisconsin Supreme Court's citation to **Dobbert V. Wainwright**, 468 U.S 1231, 1234 (1984) opinion ¶39, fails to note that the quote is from the dissent from a denial of certiorari, not the court itself. That dissent, moreover, makes no reference to recantation testimony being "cumulative" and precedes the portion quoted by the court with the qualifier: "most often"

This court's citation to ***United States V. Champion***, 813 F.2d 1154, 1172 (11th Cir. 1987), for the proposition that "[W]here the credibility of a prosecution witness was tested at trial, evidence that again attacks the credibility of that witness is cumulative," opinion¶39, also is inaccurate **Champion** merely held that the particular newly discovered impeachment evidence there was cumulative, not that such evidence is inherently cumulative. See also **Thiel,** 2003 WI 111, ¶¶78-79 (even when state's witness's credibility was attacked at trial, newly discovered impeachment evidence is not necessarily cumulative).

FACTS:

Even accepting the court's new definition of cumulative evidence, it overlooks the fact that the gravamen of McAlister's newly discovered evidence is not limited to impeachment. Rather, the newly discovered pretrial statements that McAlister was not involved in the robberies is affirmative evidence of his innocence. E.g. **Vogel v. State**, 96, Wis 2d 372, 383-84, 291 N.W2d 838 (1980) (witness's inconsistent statement is admissible for its truth, not merely as impeachment.)

Whatever evidence there may have been at trial showing that Waters and Jefferson has reason to lie, there was no affirmative evidence of McAlister's innocence. Accordingly, the newly discovered evidence of his innocence cannot be cumulative. See **Wilson**, supra citing with approval **Parker V. Hardy**, 24 pick. 246 (mass. 1837), for proposition that, where disputed issue was whether plaintiff authorized sale of horse, newly discovered evidence "the plaintiff told witness he had authorized Smart to sell the horse" was not cumulative.

Extending recantation-Corroboration Requirement to prior Inconsistent Statements

The court acknowledges that the pretrial admissions here are not "recantations" but nonetheless imposes the corroboration required of recantations because "they use [the state's witness] own words to alleged they lied at trial. Stated otherwise, as with classic recantation, the witnesses statements are presented after the witness's trial testimony and attack the veracity of the witnesses own testimony." opinion¶ 55. But recantations are

unreliable due to their timing, not their content or timing of their use. The court's rationale would apply to any use of prior inconsistent statements and overlooks the fact that, unlike actual recantations that are inherently unreliable, prior inconsistent statements like these are deemed inherently reliable. See. **Wis. Stat. (rule) 908.01(4) (a) 1**; see **Vogel**, supra (prior inconsistent statements are admissible for their truth). Indeed, it is the trial testimony of state witnesses testifying in exchange for sentencing consideration that is inherently unreliable. E.g., **On Lee V. United States**, 343 U.S. 747,757 (1952)

CORROBORATION REQUIREMENT

The court's unexplained decision to limit corroboration to the specific alternative provided in **McCallum**, 208 Wis2d at 477-78, opinion ¶¶ 58-63, overlooks the fact that McCallum intended to expand the wrongfully accused defendant's rights under previous law, not restrict them. 208 Wis 2d 477 ("requiring a defendant to redress a false allegation with significant independent corroboration of the falsity would place an impossible burden upon a wrongly accused defendant"). Nothing in McCallum suggests that it provided the exclusive means of corroborating recantation.

This court's contrary conclusion overlooks its previous recognition in **Dunlavy V. Dairyland Mut. Ins. CO.**, 21 Wis 2d 105, 114-16 124 N.W2d 73(1963), that corroboration need only "extend to some material aspect" of the recantation and that affidavits detailing independent but interlocking recognitions from separate witnesses satisfy the corroboration requirement. The court here gives no reason to abandon that settled law.

The court also overlooks the fact that its unnecessarily restrictive "corroboration" requirement undermines the search for the truth. Rules of evidence violate due process when, as here, they "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." **Holmes V. South Carolina**, 547 U.S 319, 324 (2006) (internal quotation marks and alterations omitted). The jury must decide guilt or innocence untainted by the arbitrary exclusion of relevant exculpatory evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David McAlister

Date: August 28, 2018