STATE OF WISCONSIN
IN SUPREME COURT

Appeal Nos. 01-2789 & 02-2979

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH D. ARMSTRONG,

Defendant-Appellant-Petitioner.

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Fleming, Thomas M., Annotation, Admissibility
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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") respectfully submits this nonparty brief, pursuant to Wis. Stat. (Rule) 809.19(7), in support of Ralph Armstrong's position that he is entitled to a new trial.

ARGUMENT

This case provides the Court an opportunity to clarify application of the standards for granting a new trial as a matter of due process based upon newly-discovered evidence and appellate review of such decisions. Armstrong takes the position that a slightly different standard should apply where, as here, the defense discovers not merely new exculpatory evidence, but evidence demonstrating that the state in fact relied upon false evidence to obtain the conviction. For the reasons stated in Section I, *infra*, even where the traditional newly-discovered evidence standard applies, the Court of Appeals' distortion of that standard in *State v. Avery*, 213 Wis.2d 228, 570 N.W.2d 573 (Ct. App.

1997), needs to be corrected.

For the reasons stated in Section II, the Court also should assess whether, due to the passage of time and substantially changed circumstances, it is time to reexamine whether hypnotically-enhanced testimony should be inadmissible *per se*.

I.

THIS COURT SHOULD CLARIFY APPLICATION OF THE "REASONABLE PROBABILITY OF A DIFFERENT RESULT" STANDARD FOR NEWLY-DISCOVERED EVIDENCE CLAIMS

Under Wisconsin law,

> Due process requires a new trial if the defendant satisfies the following criteria: (1) the evidence was discovered after trial; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue; (4) the evidence is not merely cumulative to the evidence presented at trial; and (5) a reasonable probability exists of a different result in a new trial.

State v. Coogan, 154 Wis.2d 387, 453 N.W.2d 186, 188 (Ct. App. 1990); *see State v. Bembenek*, 140 Wis.2d 248, 409 N.W.2d 432, 434 (Ct. App. 1987).

Even apart from the question of whether the traditional, "harmless error" standard should be substituted for the "reasonable probability" standard in "false evidence" cases such as Armstrong's, application of the newly-discovered evidence standard calls for Supreme Court clarification. Clarification is especially needed on at least two purely legal issues left unresolved or unclear by this Court's decision in *State v. McCallum*, 208 Wis.2d 463, 561 N.W.2d 707 (1997), and existing caselaw. These focus on the meaning and application of the requirement that the newly discovered evidence create a reasonable probability of a different result on retrial. *See id.*,

561 N.W.2d at 710-11.

A. Burden of Proof

The first is the applicable burden of proof, if any, regarding that requirement. The Court of Appeals in*State v. Avery*, 213 Wis.2d 228, 570 N.W.2d 573, 576-77(Ct. App. 1997), held that the defendant must prove a reasonable probability of a different result by clear and convincing evidence. This piling of burden upon burden is both confusing and legally inappropriate.

While it is often said that the defendant must bear the burden of proving entitlement to relief under Wis. Stat. §974.06 by clear and convincing evidence, this Court has recognized that such a standard is properly relevant only to evidentiary issues, and not to the type of legal, "application of law to facts" issue represented by the "reasonable probability" inquiry. *State v. Walberg*, 109 Wis.2d 96, 325 N.W.2d 687, 692 (1982).

Whether evidence creates a reasonable probability of a different result is a purely legal question. This is the same standard applied to the prejudice prong of the ineffective assistance of counsel test, under which

> [t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt.

State v. Moffett, 147 Wis.2d 343, 433 N.W.2d 572, 577 (1989) (citation omitted). This Court has held that this is a legal question reviewed *de novo, State v. Sanchez*, 201 Wis.2d 219, 548 N.W.2d 69, 76 (1996), and that the underlying legal standard for prejudice in ineffectiveness claims, moreover, is the same as that for harmlessness of other constitutional violations under *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222 (1985). *Sanchez*, 548 N.W.2d at 74.

Discussion of "burdens of proof" regarding such questions of law is meaningless:

> "The purpose of a standard of proof is to 'instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" The burden of proof relates only to the proof of facts and has no application in cases involving undisputed facts.

Walberg, 325 N.W.2d at 692. *See also O'Neal v. McAninch*, 513 U.S. 432 (1995) ("burden of proof" inapplicable to legal determination of harmlessness).

In *McCallum*, moreover, this Court appears to distinguish between the evidentiary newly-discovered evidence requirements and the "reasonable probability" standard in this regard:

> If the defendant proves these [first] four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would reached in a trial.

561 N.W.2d at 711.

This Court accordingly should clarify that the issue of whether newly discovered evidence creates a reasonable probability of a different result is a legal question not subject to a "clear and convincing" burden of proof.

B. Meaning of "Reasonable Probability"

Second is the meaning of "reasonable probability" itself as used in the newly-discovered evidence standard. The Court of Appeals' resolution of this issue in *Avery* is unclear and confusing. Rather, it merely asserts an unhelpful tautology: a reasonable probability is a reasonable probability. *Avery*, 570 N.W.2d at 579 n.1 ("If there is a reasonable probability that a jury would harbor a reasonable doubt as to guilt, it follows that there exists a reasonable probability of a different result"). The Court of Appeals in Armstrong's case simply parrots that empty standard.

The United States Supreme Court has held, in the analogous

context of a due process violation for withholding of exculpatory evidence, that "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion); *see id.* at 685 (White, J., concurring). It does not require that a different result is more likely than not. *E.g. Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

This Court did not address the meaning of "reasonable probability" in *McCallum*, although the Chief Justice did in her concurring opinion. There, she advocated for the traditional "reasonable probability" standard reflected in the federal cases. 561 N.W.2d at 716-17, citing, *e.g.*, *Strickland v. Washington*, 466 U.S. 668, 693-97 (1984). This Court has applied the same, "reasonable probability" equals "undermines confidence" standard in both ineffectiveness of counsel cases, *Sanchez*, 548 N.W.2d at 75, and post-conviction discovery, *State v. O'Brien*, 223 Wis.2d 303, 588 N.W.2d 8, 16 (1999). Indeed, the Court of Appeals in *Avery* apparently overlooked the fact that it previously had applied the federal due process standard for "reasonable probability of a different result" to a newly-discovered evidence claim in *State v. Truman*, 187 Wis.2d 622, 523 N.W.2d 177, 179 (Ct. App. 1994) ("'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome'" (citing, *inter alia Bagley*, *supra*)).

The Court of Appeals in *Avery*, however, relied upon certain irrelevant dicta in the United States Supreme Court cases to reject the due process standard it previously had applied in *Truman*. *Avery*, 570 N.W.2d at 578. While the Supreme Court distinguished "the standard generally applied by lower courts," *e.g.*, *United States v. Agurs*, 427 U.S. 97, 111 & n.19 (1976), or "widely used" for assessing newly discovered evidence motions in federal court, *Strickland*, 466 U.S. at 693-94, it did not address the legal or constitutional sufficiency of that stricter standard.

Even more importantly, however, the newly-discovered evidence standard which the United States Supreme Court sought to distinguish

in those cases simply is not the same established under Wisconsin law. The "outcome-determinative" standard referred to in those federal cases would require that the defendant "satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Agurs*, 427 U.S. at 111. Wisconsin law requires only that "a *reasonable* probability exists of a different result in a new trial." *See Coogan*, 453 N.W.2d at 188 (emphasis added). As the Supreme Court has recognized, "the adjective is important." *Kyles*, 514 U.S. at 434. Indeed, it is that very adjective which that Court recognized as differentiating the "reasonable probability" standard from the "more likely than not" standard sought by the state and apparently adopted in *Avery*. *Kyles*, 514 U.S. at 434.

Even without the adjective, the "probability" standard is not outcome-determinative under Wisconsin law. For instance, the analogous preliminary examination determination of whether a defendant "probably committed a felony" requires not proof that guilt is more likely than not, but merely a believable or plausible account of the defendant's commission of a felony. *State v. Dunn*, 121 Wis.2d 389, 359 N.W.2d 151, 154-55 (1984).

This Court accordingly should reject *Avery* and clarify that "reasonable probability of a different result" under the newly-discovered evidence standard means the same thing that language means in ineffectiveness or other due process cases: a probability sufficient to undermine confidence in the outcome.

II.

THIS COURT SHOULD RECONSIDER THE ADMISSIBILITY OF HYPNOTICALLY ENHANCED TESTIMONY

In attempting to show the absence of a reasonable probability of a different result, the state and the lower courts placed primary reliance upon the hypnotically enhanced testimony of Riccie Orebia placing

Armstrong at the scene of the crime. While this Court upheld admission of such testimony on Armstrong's direct appeal, *State v. Armstrong*, 110 Wis.2d 555, 329 N.W.2d 386 (1983), developments over the intervening 22 years suggest that it is time to reconsider that holding.

In *Armstrong I*, this Court acknowledged the dangers of suggestibility and confabulation in hypnotically influenced testimony, 329 N.W.2d at 392, 394, but nonetheless rejected a *per se* ban on such testimony in favor of a case-by-case approach, *id.* at 391-94.

> As to the first issue: we hold that the state, or other proponent, may use hypnosis to refresh the recollection of a witness to a crime providing that the proponent demonstrates that the subsequent hypnotically affected identification and testimony was not the result of an impermissibly suggestive hypnosis session and provided further that the other side is allowed to present to the jury expert testimony regarding the effect of hypnosis on recall. If challenged, the admissibility of a hypnotically affected identification or in-court testimony is to be determined by the court, preferably in a pretrial suppression hearing. The proponent has the burden of demonstrating at such hearing to the satisfaction of the judge acting within his discretion that the conduct of the hypnosis session did not make the witness' testimony unreliable.

329 N.W.2d at 389.

Given the legal and scientific developments since *Armstrong* was decided, WACDL respectfully submits that reconsideration of this case-by-case approach is appropriate. *See also Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (Rehnquist, Ch.J., dissenting) ("No known set of procedures . . . can insure against the inherently unreliable nature of such testimony").

In 1979, the International Society for Hypnosis (ISH), a group whose members are (and were then) composed not only of those who

conduct research on hypnosis, but also those who use hypnosis as part of their clinical practices, issued a strong warning concerning the forensic use of hypnosis:

> Because we recognize that hypnotically aided recall may produce either accurate memories or at times may facilitate the creation of pseudo-memories or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the use of this technique among the police. It must be emphasized that there is no known way of distinguishing with certainty between actual recall and pseudo memories except by independent verification.

International Society for Hypnosis Resolution, Adopted August 1979, 27 *The International Journal of Clinical and Experimental Hypnosis* at 453 (1979).

In the 25 years since the ISH published this resolution, research has convincingly shown that their concerns were warranted.

The research shows unambiguously that hypnosis increases the sheer volume of recall, resulting not only in more correct information, but in more incorrect information as well.[1] When the volume of output is controlled, hypnotic recall is not more accurate than non-hypnotic recall Erdelyi, M., Hypnotic hypermnesia: The empty set of hypermnesia. 42 *International Journal of Clinical and Experimental Hypnosis* 379-390 (1994) (in a review of 34 studies); Steblay, N.M. & Bothwell, R.K., Evidence for hypnotically refreshed testimony: The view from the laboratory, 18 *Law and Human Behavior* 635-651 (1994) (in a review of 24 studies). In addition, hypnosis results in increased confidence, even for responses that were designated as guesses during a prior non-hypnotized test. Whitehouse, W.G., Dinges, D.F., Orne,

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[1] WACDL thanks Steven E. Clark, Ph.D., Associate Professor of Psychology at the University of California, Riverside, for his invaluable assistance in assembling the research cited in this brief on the question of hypnotically refreshed testimony.

E.C., & Orne,, M.T., Hypnotic hypermnesia: Enhanced memory accessibility or report bias? 97 *Journal of Abnormal Psychology* 289-295 (1988).

These results, taken together, tell us that the use of hypnosis can produce a witness who will have much to say, will say it with increased self-assurance, and will be more likely to be wrong.

Some courts have stipulated that hypnotically-affected testimony can be admitted so long as procedural guidelines and safeguards are followed. These procedures, known as the "Hurd" or "Orne" rules, were first elaborated in *State v. Hurd*, 432 A.2d 86 (N.J. 1981), and this Court established similar procedures in *Armstrong I.*

Despite their face value and initial promise, however, the Hurd guidelines have not been universally accepted. Critics of the guidelines, which include Martin Orne who originally worked to develop them, argue that hypnotically-elicited testimony is so unreliable that no array of procedural safeguards can outweigh the inherently biasing effect of hypnosis. As stated in *People v. Gonzales*, 329 N.W.2d 743, 747 (Mich. 1982), quoting with approval from *People v. Gonzales,* 310 N.W.2d 306 (Mich. App. 1981), the Hurd guidelines have the potential to illuminate hypnotic testimony with an unwarranted "aura of reliability", leaving the jury to believe that hypnotic testimony should be *more* reliable, provided that the guidelines were followed.

To date, 27 states have ruled that hypnotically-affected testimony is *per se* inadmissible. *See* Thomas M. Fleming, Annotation, Admissibility of Hypnotically Refreshed or Enhanced Testimony, 77 A.L.R. 4th 927, 943-47 (1990) and 2003 Supp. at 29-30 (collecting cases); Michael J. Beaudine, Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall, 41 Vand.L.Rev. 379, 400 (1988) (stating per se inadmissibility is majority rule).[2]

Indeed, of the nine jurisdictions this Court cited in support of its

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[2] The one exception to the *per se* inadmissibility rule concerns the defendant's own testimony. *E.g.*, *Rock v. Arkansas*, 483 U.S. 44 (1987); *see* Fleming, 77 A.L.R.4th §8 at 967-69.

holding in 1983, *Armstrong*, 329 N.W.2d at 392 n.11, only four still explicitly follow the case-by-case approach as to the admissibility of post-hypnosis testimony. One jurisdiction, New Jersey, has not overruled its seminal case, *State v. Hurd, supra,* but has agreed to revisit the question in light of the growing number of jurisdictions which have concluded that post-hypnosis testimony is *per se* inadmissible. *State v. Moore*, 2004 WL 886220 (N.J. 2004). Four other jurisdictions have overruled the case-by-case approach in favor of a *per se* ban on post-hypnosis testimony. *See State v. Peoples*, 319 S.E.2d 177, 188 (N.C. 1984) ("hypnotically refreshed testimony is inadmissible in judicial proceedings"), overruling *State v. McQueen*, 244 S.E.2d 414 (N.C. 1978); *Alsbach v. Bader*, 700 S.W.2d 823, 830 (Mo. 1985) ("Although recognized to be a valid therapeutic technique, it cannot be said that hypnosis is recognized as a valid fact-finding tool"), overturning *State v. Greer*, 609 S.W.2d 423 (Mo.Ct.App.1980); *People v. Zayas*, 546 N.E.2d 513, 518 (Ill. 1989) ("we find that because its reliability is suspect, and it is not amenable to verification due to the fact that even the experts cannot agree upon its effectiveness as a memory-restorative device, a witness' hypnotically induced testimony, other than that of the defendant, is not admissible in Illinois courts"), overturning *People v. Smrekar*, 385 N.E.2d 848 (Ill. App. 1979). The Florida case cited in *Armstrong*, *Clark v. State*, 379 So.2d 372 (Fla.Dist.Ct.App.1979), similarly was overruled by *Bundy v. State*, 471 So.2d 9, 18 (Fla. 1985) ("hypnotically refreshed testimony is per se inadmissible in a criminal trial in this state"), *modified by Morgan v. State*, 537 So.2d 973, 976 (Fla. 1989) (permitting the defendant to testify as a witness following hypnosis).[3]

To ensure the accuracy of Wisconsin verdicts, this Court should do so as well.

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[3] Only one state, Colorado, appears to have gone the other direction. *See People v. Romero*, 745 P.2d 1003 (Colo. 1987) (applying case-by-case approach), overruling *People v. Quintanar*, 659 P.2d 710 (Colo. App. 1982) (hypnotically refreshed testimony *per se* inadmissible).

CONCLUSION

For these reasons WACDL asks that the Court provide necessary clarification regarding application of the "reasonable probability of a different result" standard, correct the Court of Appeals' mistake in *Avery*, and overrule its holding permitting admission of inherently unreliable, hypnotically-enhanced testimony in *Armstrong I.*

Dated at Milwaukee, Wisconsin, February 8, 2005.

Respectfully submitted,

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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 nonparty brief produced with a proportional serif font. The length of this brief is 2,863 words.

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