STATE OF WISCONSIN

IN SUPREME COURT

Nos. 01-2789 and 02-2979

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH D. ARMSTRONG,

Defendant-Appellant-Petitioner.

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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The State of Wisconsin opposes Armstrong's petition for review in this case for all of the following reasons:

ARGUMENT

I. THIS COURT SHOULD NOT GRANT REVIEW OF ARMSTRONG'S CLAIM THAT THE STANDARD FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE DEPRIVED HIM OF THE RIGHT TO A JURY DETERMINATION OF GUILT OR INNOCENCE BECAUSE ARMSTRONG NEVER PRESENTED THAT CLAIM BELOW AND BECAUSE ARMSTRONG'S CLAIM IS UNSUPPORTED.

In *State v. Avery*, 213 Wis. 2d 228, 237-41, 570 N.W.2d 573 (Ct. App. 1997), the court of appeals held

that in order to obtain a new trial on the ground of newly discovered evidence, including newly discovered DNA evidence, the defendant must prove by clear and convincing evidence that there is a reasonable probability a new trial will reach a different verdict.

Armstrong claims the court of appeals' application of the *Avery* standard in his case deprived him of the fundamental right to a jury determination of his guilt or innocence. Armstrong never claimed in the circuit court or in the court of appeals that the use of the *Avery* standard would deprive him of the fundamental right to a jury determination of guilt or innocence. A claim that is raised for the first time in the supreme court is waived. *Neely v. State*, 97 Wis. 2d 38, 55, 292 N.W.2d 859 (1980). This court should not grant review in order to reach a constitutional claim that was never argued or presented in the circuit court or the court of appeals.

Wisconsin statutory and case law has long required a defendant seeking a new trial on grounds of newly discovered evidence to prove the new evidence makes it reasonably probable that a different result would be reached on retrial. *State v. Boyce*, 75 Wis. 2d 452, 249 N.W.2d 758 (1977); State *v. Brunton*, 203 Wis. 2d 195, 552 N.W.2d 452 (Ct. App. 1996); Wis. Stat. § 805.15(3). Armstrong cites no precedent that suggests this standard deprives him of his constitutional right to a jury determination of guilt or innocence.

The sole case cited by Armstrong, *Sullivan v. Louisiana*, 508 U.S. 275 (1993), does not support his theory. In *Sullivan* the United States Supreme Court held that a constitutionally deficient reasonable doubt instruction cannot be harmless error. The Court stated that the jury verdict guaranteed by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt; when the jury receives an erroneous reasonable doubt instruction,

there has been no jury verdict within the meaning of the Sixth Amendment.

Sullivan cannot be converted into authority for the proposition that requiring a defendant to prove a reasonable probability that the newly discovered evidence would produce a different result at a new trial deprives the defendant of his constitutional right to a jury determination of guilt or innocence. Indeed, by granting a new trial when it is not warranted, the court "'may encroach on the jury's important fact-finding function.'" *State v. Luckett*, 761 N.E.2d 105, 110 (Ohio Ct. App. 2001), quoting *Tri Cty. Industries, Inc. v. District of Columbia*, 200 F.3d 836, 840 (D.C. Cir. 2000).

Contrary to Armstrong's assertion, this case does not present a real and significant question of state and federal constitutional law that should be resolved by this court.

II. THIS COURT SHOULD NOT GRANT REVIEW OF ARMSTRONG'S CLAIM THAT THE NEWLY DISCOVERED EVIDENCE STANDARD SHOULD BE REPLACED BY THE HARMLESS ERROR TEST BECAUSE HIS FACTUAL PREMISE FOR THAT CLAIM IS WRONG AND HE PROVIDES NO SUPPORTING LEGAL AUTHORITY.

Armstrong asks this court to abandon the *Avery* standard in favor of a harmless error test. Armstrong asks this court to focus on some forensic evidence that was presented at trial, which is now contradicted by the newly discovered evidence, and to require the State to prove beyond a reasonable doubt that that evidence was harmless error.

Based on the newly discovered DNA evidence, Armstrong asserts that it is "undisputed that false biological evidence" was presented to the jury at his trial (Petition at 3). This factual premise is wrong. The new DNA test results do not prove that Armstrong's jury was presented with "false" evidence.

The victim, a young woman named Charise Kamps, was brutally sexually assaulted and murdered in her Madison, Wisconsin apartment on June 24, 1980. Her body was found nude on the bed, with a bathrobe belt draped on her back (*State v. Armstrong*, slip op. ¶ 2; see also *State v. Armstrong*, 110 Wis. 2d 555, 561, 329 N.W.2d 386 (1983). At Armstrong's trial in 1981, Coila Jo Wegner, a microanalyst at the State Crime Laboratory, testified that she examined two head hairs found on the bathrobe belt on Kamps' body. She testified that one head hair was consistent with the head hair standard from Armstrong and one was similar to the head hair standard from Armstrong. She explained hair is called consistent if it meets the majority of criteria for the same areas between hairs and it is called similar when there are some differences as well as consistencies (174:124). Wegner further explained that this type of hair examination cannot identify a person as the source of the hair, and she could not say that a specific hair came from a specific individual (174:126-27; *Armstrong*, slip op. at ¶22). Wegner also testified that seminal material found on a bathrobe lying on the floor beside the bed was indicative of a Type A secretor; based on the standard she took from Armstrong, he is a Type A secretor, as is Brian Dillman, Kamps' boyfriend, as well as eighty percent of the population (174:125; *Armstrong*, slip op. at 21). She also testified that she could not give an opinion on when the semen stains had been on the robe or how long they had been there. She also testified that the placement of the stains on the robe was consistent with normal drainage that could occur if a person wore the robe and sat down in it, after having had sexual intercourse (174:127-28).

In 1991 Armstrong filed a motion for new trial based on DNA test results that excluded him as a source of the semen on the bathrobe; the trial court denied that motion and the court of appeals affirmed in an unpublished opinion, concluding that it is not reasonably probable the newly discovered evidence would produce a different result at a new trial (*State v. Armstrong*, No. 92-0232-CR (Ct. App. June 17, 1993).

In his most recent motion for a new trial based on newly discovered evidence, which is at issue here, Armstrong presented a new type of previously unavailable DNA analysis that excluded him as the source of the two head hairs found on the bathrobe belt. Armstrong asserts that the new DNA analysis on the head hairs proves that Wegner's testimony, which was presented to the jury at his 1981 trial, was false. He claims that he is entitled to a new trial because it is possible the false evidence contributed to the jury's verdict.

Armstrong's factual premise is simply wrong. Wegner's testimony was not "false" in any sense of that word. As the postconviction court recognized, using the tests that were within the realm of scientific knowledge at the time of trial in 1981, Wegner testified to a reasonable degree of certainty that one head hair was consistent with and one head hair was similar to the head hair standards provided by Armstrong (174:56). The defense does not dispute that even if the DNA test results eliminated Armstrong as the source of the head hairs, those hairs could still be said to be "similar" or "consistent" with Armstrong's hair (174:57).

Armstrong's new DNA test results provide the basis for his expert witness to offer his opinion, to a reasonable degree of scientific certainty, that the DNA found in the head hairs could not have come from Armstrong. If found reliable and credible, the DNA evidence leads to the inference that the head hairs did not

come from Armstrong. The fact that this inference can be drawn from the new scientific evidence simply does not mean that the State presented false evidence at the prior trial; it does not mean Wegner's testimony was erroneously admitted; and it does not mean the State should be required to prove beyond a reasonable doubt that the admission of Wegner's testimony did not contribute to the jury's verdict.

Armstrong provides no support in law or logic for his harmless error theory. To the contrary, Wisconsin law recognizes that "[a] motion for a new trial based on newly-discovered evidence does not claim that there were errors in the conduct of the trial or deficiency in trial counsel's performance." *State v. Brunton*, 203 Wis. 2d at 206.

It is neither necessary nor appropriate for this court to grant review in order to consider Armstrong's baseless harmless error theory.

Armstrong suggests that even if this court does not adopt his harmless error approach it should re-examine the "unfairly strict" burden of proof established in *Avery*. The fact that Avery's conviction was ultimately vacated based on further DNA testing does not mean that the standard and burden of proof for newly discovered evidence is "unfairly strict."

The facts in Armstrong's case are materially distinguishable from the facts that ultimately led the circuit court to vacate Avery's conviction. The circuit court's order in *Avery* was based on a stipulation by the prosecutor and defense following DNA testing by the State Crime Laboratory. The parties stipulated that the DNA testing "excludes Steven A. Avery as the perpetrator of the sexual assault in this case, and identifies another man as the perpetrator" and that the DNA test results established by clear and convincing evidence that "Steven A.

Avery is actually innocent of the offense for which he has been convicted." *Avery* Stipulation at 2 (a copy of stipulation and order filed in *State v. Steven A. Avery*, Manitowoc County Case No. 85-FE-118, on September 10, 2003, is attached as an appendix to this response).

The DNA testing reports provided by Armstrong do not provide a basis for a comparable stipulation and no such stipulation has been entered by the State. Quite the contrary. At the postconviction hearing, the State conceded that the DNA results presented in the reports provided by the defense were the results actually reached by the defense experts; the State did not present contradicting expert testimony; and the State recognized that if the DNA testing results are accepted as accurate and reliable, they would support a finding that Armstrong, Dillman and Kamps were not the sources of the two head hairs found on the belt, that Armstrong was not the source of the semen found on the bathrobe and that Dillman was the source of that semen (174:5-6, 9). However, the State did not concede or stipulate that Armstrong's DNA test results were correct or accurate and the State did not stipulate to the chain of custody of the items tested by the defense experts.[1]

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[1]As the postconviction court noted, the materials provided by the defense expert, Dr. Blake, were far from objective and unbiased. He engaged in unprofessional speculation that Armstrong is innocent and that the real, unknown killer left the two head hairs on the scene (174:34). Indeed, the defense admitted it would not even call Dr. Blake as a witness, but would call a "crime scene expert" who would testify that because the belt was found "right over the body where the killer had to have been during the course of the murder, and the hairs are on top of it, . . . that that was extremely probative, highly probative. That it was deposited at or around the time of the murder" (174:113). Such testimony would be inadmissible because it constitutes nothing more than the expert's attempt to arrogate to himself an ability superior to that of a jury to evaluate evidence and arrive at a determination of fact. *State v. Dalton*, 98 Wis. 2d 725, 731, 298 N.W.2d 398 (Ct. App. 1980).

Even assuming the DNA evidence excludes Armstrong as the source of DNA evidence found in two head hairs on a bathrobe belt and semen stains on a bathrobe found in Kamps' apartment, that does not exclude Armstrong as the person who sexually assaulted and murdered Kamps. The DNA evidence does not prove that the head hairs came from an unknown person who placed the bathrobe belt across Kamps' body. The DNA evidence does not prove that an unknown person, instead of Armstrong, brutally assaulted and murdered Kamps.

Armstrong has offered only speculation that the head hairs on the bathrobe belt were deposited there at the time of the crime and, therefore, must have come from the "real" assailant and murderer. It is undisputed that people continually shed hair and that, once shed, hair is very mobile. Hair may land on any number of surfaces and it will not necessarily remain where it lands. The defense emphasized this effectively at closing argument (171:105-15). It is undisputed that Armstrong's girl-friend, Jane May, and numerous police officers were in the apartment after the body was discovered and before the bathrobe belt was removed and placed in an evidence bag. It was late June; the fan in the apartment may have

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The defense also engaged in unsupported speculation that the bathrobe belt may well have been "the instrument of death" (174:113). There was no evidence that Kamps was strangled with any kind of ligature. The forensic pathologist testified to bruising on the neck and fingernail scratching consistent with strangulation by hand (174:116). The defense also offered a personal observation that the bathrobe belt was bloodstained (174:36). No testimony in the trial record supports that assertion.

Armstrong asserts the new DNA test results show the two head hairs came from the same unknown person (155:Exh. 1 at 10). The expert report does not go that far; it says only that the "sequences" of the hairs match and "[t]herefore, we cannot exclude the possibility that they came from the same person or maternally related persons" (155:Exh. 2 at 3).

been on before the belt was packaged (168:8, 19-20). The two hairs on the bathrobe belt could have landed on the belt well before the night of the crime and simply remained on the belt when the belt was placed across the body. Or, the people milling around the apartment could have deposited the hair after the murder.

As the circuit court pointed out, and as Armstrong reluctantly conceded at the postconviction hearing, the evidence does not show whose head hairs were on the bathrobe belt, how long they had been there, or when or how they got there (174:33-34, 36).

Armstrong has failed to demonstrate that this court should grant review in order to re-examine the long-standing Wisconsin law[2] that requires a defendant seeking a new trial to prove by clear and convincing evidence that the newly discovered evidence creates a reasonable probability that the result of a new trial would be different.

[2]Indeed, even under the new DNA statute, Wis. Stat. § 974.07, the legislature has chosen to require a defendant who seeks a new trial based on DNA evidence to meet the "reasonable probability of a different result at a new trial" standard for newly discovered evidence. *See* Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 Wis. Lawyer 20 (May 2002).

III. THIS COURT SHOULD NOT GRANT REVIEW BECAUSE THE CIRCUIT COURT AND THE COURT OF APPEALS CORRECTLY DETERMINED THAT ARMSTRONG FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE NEWLY DISCOVERED EVIDENCE CREATES A REASONABLE PROBABILITY THAT THE RESULT OF A NEW TRIAL WOULD BE DIFFERENT.

Armstrong is not entitled to a new trial even under the current standard. As both the circuit court and the court of appeals correctly held, Armstrong did not prove by clear and convincing evidence that, based on the evidence that was presented at his trial and on the new evidence obtained from the DNA testing, there is a reasonable probability that at a new trial, the jury would find him not guilty (*Armstrong*, slip op. at ¶¶ 36-44).

The lower courts properly considered the new evidence (and what it does and does not prove) and all of the evidence of guilt that was presented at trial. *Avery*, 213 Wis. 2d at 242-46. *See State v. Coogan*, 154 Wis. 2d 387, 402, 453 N.W.2d 186 (Ct. App. 1990). As noted above, at most the new DNA evidence excludes Armstrong as the source of the DNA found in two head hairs collected from a bathrobe belt found on Kamps' body and semen stains collected from a bathrobe on the floor of Kamps' apartment. The DNA evidence does not exclude Armstrong as the assailant and murderer and it does not establish that a different, unknown and unidentified person is the assailant and murderer.

Armstrong asserts that the hair and semen evidence presented at his trial bolstered and lent credence to the State's otherwise weak case. The record does not

support that assertion. The State presented evidence that Armstrong could not be eliminated as the source of the hair, but science did not permit the State's expert to say more at the time of trial. The semen could have come from either Armstrong or Dillman. It was undisputed that Armstrong had been in Kamps' apartment earlier that day (and on previous occasions), so the presence of his hair there was not inherently suspicious. There is no reason to believe that the original jury would have found all of the State's other evidence incredible or unpersuasive, but for the old "non-exclusion" evidence. Based on the entire record, therefore, there is no reason to believe that, at a new trial without the old "non-exclusion" evidence and with the new DNA "exclusion" evidence, the jury would find all of the State's other evidence incredible or unpersuasive.

Armstrong mounts a vitriolic attack on the trial testimony of witness Ricci Orebia, whose identification was critical evidence of Armstrong's guilt. Armstrong ignores the fact that the jury obviously found Orebia's identification testimony credible. There is no reason to believe Armstrong's new DNA test results would change the jury's assessment of Orebia's credibility. The new DNA evidence would not alter the jury's assessment of Orebia's credibility because there are too many possible innocent alternative sources for the DNA. There is an entirely innocent explanation for the DNA in the semen on the bathrobe (it came from Dillman on a prior occasion). There are numerous innocent explanations for the DNA in the two hairs found on the bathrobe belt (it had landed on the bathrobe belt at some prior, unrelated time and simply stayed on the belt when the belt was placed across Kamps; alternatively, it was deposited on the belt after the crime during the initial period of discovery and investigation when many individuals were moving in and about the apartment). Testimony showing the DNA was not contributed by Armstrong would not provide a sub-

stantial basis for a new jury to refuse to find Orebia's identification testimony credible.

Armstrong also ignores the three prior appellate court decisions that speak to the reliability, credibility and persuasiveness of Orebia's testimony. The previous appellate decisions have determined the reliability of Orebia's testimony and have rejected all of the same attacks Armstrong now makes on the identification testimony.

This court's prior appellate decision evaluated the trial evidence in the precise context now presented: whether new DNA evidence creates a reasonable probability of a different verdict at a new trial. Furthermore, the prior appellate court decisions in this case address the other evidence presented at trial by the State, which Armstrong now attacks. This court should consider the prior appellate court decisions in this case binding authority on the issues of the admissibility, reliability, weight, and strength of the evidence and the likelihood an acquittal would result from a new trial. *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986); *Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989) (a decision on a legal issue by an appellate court establishes the law of the case that must be followed in all subsequent proceedings in the case in both the circuit court and appellate courts).

The court of appeals fairly characterized Orebia's identification testimony at trial as "unshaken" when it affirmed the denial of Armstrong's previous motion, because there was no reasonable probability of a different verdict based on the newly discovered DNA evidence eliminating Armstrong as the source of the semen on the robe. *State v. Armstrong*, No. 92-0232-CR, slip op. at 3.

Armstrong once again attacks the State's trial evidence proving that it was possible for Armstrong to have

been at Kamps' apartment at the time the assault and murder occurred, and that it was not possible for him to have been there at some earlier time in the evening, as Armstrong claimed. The jury heard both Armstrong's testimony and the volume of State's evidence tracking and timing Armstrong's whereabouts and movements that night. The jury obviously found the State's evidence, not Armstrong's testimony, credible and true. There is nothing about Armstrong's newly discovered DNA test results that would cause a new jury to believe Armstrong's version of his whereabouts that night and to disbelieve the State's evidence about his whereabouts that night.

As the court of appeals recognized in its earlier decision in this case, "Armstrong attempted to present an alibi for that time [the hours when the crime occurred] that the state effectively demolished." *Armstrong*, No. 92-0232-CR, slip op. at 3. There is absolutely no justification for this court to take a different view of the effectiveness of the State's evidence disproving Armstrong's alibi defense.

Armstrong devalues the State's trial evidence that the day following the assault and murder, Armstrong possessed a large amount of cash, which was nearly identical to the amount missing from Kamps' apartment. The court of appeals properly described the evidence: "Additionally, the day after the murder Armstrong made an unusually large deposit of $315 in cash in his bank account. Kamps was known to have had $400 in her apartment the previous day that was never found." *Armstrong*, No. 92-0232-CR, slip op. at 3-4. The money was part of the totality of the State's evidence of guilt that makes it unlikely a new trial would produce a different verdict.

Armstrong's newly discovered DNA results do not exclude Armstrong as the person who raped and mur-

dered Kamps. The DNA results do not show that a different, unknown person is Kamps' rapist and murderer. Every court that has looked at this case in the past twenty plus years has concluded that Orebia reliably identified Armstrong as the man he saw entering and exiting Kamps' apartment building at the crucial time. Orebia's identification testimony and the other strong circumstantial evidence of Armstrong's guilt would not be appreciably weakened by the new DNA results.

The circuit court and the court of appeals carefully considered all of this evidence (*Armstrong*, slip op. at ¶¶ 36-44) and properly concluded that Armstrong failed to prove by clear and convincing evidence that it is reasonably probable that, at a new trial, the DNA results would cause the jury to discredit all of the evidence of guilt and to acquit Armstrong.

In the course of rejecting Armstrong's assertion that the court should use the harmless error test instead of the newly discovered evidence test, the court of appeals commented:

> Which test we use is of potential significance. This is an extremely close case. It is not possible to tell from this record whether Armstrong is innocent or guilty. While we affirm the trial court's decision to use the newly discovered evidence test, the use of a harmless-error test would probably result in our reversing the trial court's order.

Armstrong, slip op. at ¶ 34.

The court of appeals' musing about what it would probably do under a different legal standard is irrelevant; it sheds absolutely no light on whether Armstrong met his burden of proving he is entitled to a new trial under the newly discovered evidence standard.

The court of appeals' characterization of this as an extremely close case is puzzling in light of its prior recognition, based on the exact same trial evidence, that the State presented the "unshaken testimony of Kamps' neighbor who saw Armstrong acting strangely going in and out of Kamps' apartment building during the hours when the crime occurred"; that the State "effectively demolished" Armstrong's testimony about his whereabouts that night; and the State proved that "the day after the murder Armstrong made an unusually large deposit of $315 in cash in his bank account. Kamps was known to have had $400 in her apartment the previous day that was never found. Armstrong was aware of the cash because it was he who had paid it to her to satisfy a debt." *Armstrong*, No. 92-0232-CR, slip op. at 3-4.

The court of appeals' gratuitous comment that "[i]t is not possible to tell from this record whether Armstrong is innocent or guilty" (*Armstrong*, slip op. at ¶ 34) simply has no legal significance. It is never possible for a reviewing court to tell from the appellate record whether the individual convicted is innocent or guilty. The reviewing court is not a fact-finder and it is not proper for it to make its own assessment of guilt or innocence based on the appellate record. Even when a reviewing court determines that the State has not proven that constitutional trial error was harmless beyond a reasonable doubt, and even when the reviewing court determines the evidence presented at trial was not sufficient to prove the defendant's guilt beyond a reasonable doubt, the court is not determining from the record whether the defendant was innocent or guilty. Rather, the reviewing court is determining, based on the record, whether a particular legal standard was or was not met.

Although the court of appeals' comment was imprudent, it does not provide any basis for this court to grant review. The court of appeals' opinion is unpublished. It will do no harm to the development of the law.

Armstrong appears convinced that a new trial will produce a more reliable result than the trial that occurred over twenty years ago. This court should not share that view. In *Herrera v. Collins*, 506 U.S. 390, 403 (1993), Chief Justice Rehnquist explained that the federal courts should be extremely reluctant to require a state to either release a prisoner or retry him many years after the first trial "simply because of a belief that in light of petitioner's new-found evidence a jury might find him not guilty at a second trial. Yet there is no guarantee that the guilt or innocence determination would be any more exact. To the contrary, the passage of time only diminishes the reliability of criminal adjudications."

So it is here. In 1981, Armstrong was tried and convicted of the sexual assault and murder of Charise Kamps. His conviction has been repeatedly upheld against various constitutional challenges in both the state and federal courts. There is no reason to believe a new trial now, over twenty years later, would lead to a more reliable or correct determination of guilt or innocence.

IV. THIS COURT SHOULD NOT GRANT REVIEW OF ARMSTRONG'S CLAIM THAT HE SHOULD HAVE A NEW TRIAL BECAUSE THE REAL CONTROVERSY WAS NOT FULLY TRIED.

The court of appeals carefully considered and rejected Armstrong's request for a new trial in the interest of justice (*Armstrong*, slip op. at ¶¶ 45-50). Aside from his understandable self-interest in obtaining a new trial, Armstrong offers absolutely no reason why this court should grant review of the same request. This court "ordinarily will refrain from reviewing court of appeals decisions made in the interest of justice, for there is no assumption by this court that its determinations are necessarily more just than those of a court of appeals."

State v. McConnohie, 113 Wis. 2d 362, 368, 334 N.W.2d 903 (1983). This court further explained:

> [B]y definition, the interest of justice in an individual case is not the usual concern of this court, which, as we have stated above, is the responsibility for assuring that law is properly interpreted, applied, and developed uniformly throughout the state. The appellate function of seeing to it that justice is done in the individual case is primarily the function of the court of appeals.

McConnohie, 113 Wis. 2d at 370-371.

Moreover, even if this court were to grant review it is extremely rare for this court to grant a new trial in the interest of justice. Armstrong claims this court should do so because his case is like *State v. Hicks*, 202 Wis. 2d 150, 549 N.W. 2d 435 (1996). As the court of appeals found, *Hicks* is materially distinguishable from Armstrong's case:

> Armstrong primarily relies upon ***State v. Hicks***, 202 Wis. 2d 150, 549 N.W.2d 435 (1996), for his argument that the real controversy was not tried in his case. In ***Hicks***, the supreme court concluded that the real controversy of identification was not tried when "the State used the hair evidence assertively and repetitively as affirmative proof of Hicks' guilt" and, after trial, DNA tests excluded Hicks as a donor of the hair. ***Id.*** at 153. At trial, the victim testified that her attacker was an African American and that the assault occurred in her apartment ***Id.*** She also testified that no African American male had ever been in her apartment before the assault. ***Id.*** at 155. A crime lab analyst testified that the pubic and head hear found at the scene came from an African American. ***Id.*** at 154. Therefore, the evidence established that the hairs came from her attacker. ***Id.*** Hicks, who was African American, claimed that he had never been in the victim's apartment and could not have been the source of the hair found there. ***Id.*** at 163. The jury found Hicks guilty of robbery and two counts

> of sexual assault. ***Id.*** at 152. The supreme court reasoned that it could not "say with any degree of certainty that the hair evidence used by the State during trial played little or no part in the jury's verdict." ***Id.*** at 158-59. Pursuant to Wis. Stat. § 751.06, it ordered a new trial in the interest of justice. ***Id.*** at 159.
>
> The facts of Armstrong's case do not compel a new trial in the interest of justice. Unlike Hicks, Armstrong admitted that he was in Kamps' apartment; he disputes only whether he was there when the murder occurred.

Armstrong, slip op. ¶¶ 48-49.

Moreover, the prosecutor's closing argument in Armstrong was decidedly restrained in comparison to the argument in *Hicks*. The jury in Armstrong's case heard eyewitness testimony identifying Armstrong as the man who entered and exited Kamps' apartment at the crucial time; the jury in Armstrong was presented with strong circumstantial evidence of guilt, including evidence that Armstrong could not have been in Kamps' apartment at the earlier time he claimed; his alleged "alibi" for the time when the crimes occurred was demolished by the State's evidence; and the day after the Kamps was murdered Armstrong deposited an amount of cash that matched the amount of cash Kamps was known to have in her possession shortly before she was killed, that Armstrong knew she had, and that was missing from her apartment when the murder was discovered. No comparable, strong circumstantial evidence of guilt had been presented in *Hicks*.

The identity of Kamps' rapist and murderer was fully tried in 1981. A new trial in the interest of justice is not warranted.

CONCLUSION

Based on the entire record, including all of Armstrong's prior litigation, and based on the legal theories and authority presented herein, the State asks this court to deny Armstrong's petition for review.

Dated this 12th day of July, 2004.

Respectfully submitted,

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CERTIFICATION

I certify that this response meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The response contains 5,300 words.

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