STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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July 29, 2004

Ms. Cornelia G. Clark
Clerk of Supreme Court
Post Office Box 1688
Madison, WI 53701-1688

Re: State v. Ralph D. Armstrong
Case Nos. 01-2789 and 02-2979 (District IV)

Dear Ms. Clark:

Enclosed for filing please find the original and eight copies of Response to Motion to File Nonparty Brief in Support of Petition for Review and Extension of Time to File Same in the above-entitled matter. A copy is being mailed this date to the parties involved.

Sincerely,

Sally L. Wellman
Assistant Attorney General
Attorney for Plaintiff-Respondent

SLW:dc

c: Robert R. Henak
Attorney for Wisconsin Association
of Criminal Defense Lawyers

Jerome F. Buting
Attorney for Defendant-Appellant

John Norsetter
Assistant District Attorney
Dane County

Enclosures

STATE OF WISCONSIN

IN SUPREME COURT

Nos. 01-2789 & 02-2979

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH D. ARMSTRONG,

Defendant-Appellant-Petitioner.

RESPONSE TO MOTION TO FILE NONPARTY BRIEF IN SUPPORT OF PETITION FOR REVIEW AND EXTENSION OF TIME TO FILE SAME

The State, by its undersigned attorneys, hereby responds as follows to the motion of the Wisconsin Association of Criminal Defense Lawyers (WACDL) for leave to file a nonparty brief in support of Armstrong's petition for review and for extension of time for filing same:

1. WACDL's brief and motion do not demonstrate that sufficient and important reasons exist for this court to grant review in Armstrong's case.

2. Contrary to WACDL's assertion, there is no need for this court to "clarify" the meaning of the standard a defendant must meet to obtain a new trial on the ground of newly discovered evidence. For decades Wisconsin case law has consistently required a party seeking a new trial on the ground of newly discovered evidence to establish a reasonable probability that a different result would be reached on a new trial. *State v. Boyce*, 75 Wis. 2d 452, 457, 249 N.W.2d 758 (1977) (and authority cited therein).

The concurring opinion in *State v. McCallum*, 208 Wis. 2d 463, 489-90, 561 N.W.2d 707 (1997) (Abrahamson, C.J., concurring), would have defined "reasonable probability" to mean the same thing as the test that is used for reversal for prejudicial error. Thus, a new trial would be granted on the ground of newly discovered evidence if the new evidence undermines the court's confidence in the correctness of the outcome of the original trial. The majority, however, did not adopt that view. The court of appeals in *State v. Avery*, 213 Wis. 2d 228, 237-41, 570 N.W.2d 573 (Ct. App. 1997), did not break new ground or establish a new standard or create a new meaning for the term "reasonable probability." *Avery* merely applied long-standing, well-established law. *Avery* simply rejected the "confidence

in the outcome" approach, which had been rejected by the *McCallum* majority. There is nothing to clarify; there is no reason to revisit the issue of what "reasonable probability" means in the context of a motion for new trial on grounds of newly discovered evidence.

3. Contrary to WACDL's assertion, there is no need for this court to grant review in this case as a back-door way to review the holding in *Avery* that a defendant seeking a new trial on grounds of newly discovered evidence must prove a reasonable probability of a different result by clear and convincing evidence.

WACDL advances the theory that it is not proper to place a burden of proof on the reasonable probability requirement because, like prejudice, it is a "legal issue." The point is not well taken. The law is well-established that a criminal defendant has the burden of proving both the prejudice and the deficient performance prongs of an ineffective assistance of counsel claim. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Moreover, in cases in which the State must prove harmless error, it must prove it beyond a reasonable doubt. *State v. Weed*, 2003 WI 85, ¶ 29, 263 Wis. 2d 434, 666 N.W.2d 485.

Indeed, even the concurring opinion in *McCallum* stated that the defendant must satisfy each element of the newly discovered evidence test, including the reasonable probability element. *McCallum*, 208 Wis. 2d at 486-88 (Abrahamson, C.J., concurring).

There is nothing unusual, wrong, novel or significant about placing the burden on the defendant to prove he is entitled to a new trial on the ground of newly discovered evidence.

WACDL's brief and motion fail to establish that, in fact, sufficient and important reasons exist for this court to grant review in Armstrong's case.

4. Armstrong seeks review of the court of appeals' affirmance of the circuit court's denial of his Wis. Stat. § 974.06 motion, which sought a new trial solely on the ground of newly discovered DNA evidence. Given the posture of this case, the State is baffled by WACDL's suggestion that this court should grant review in order to "reconsider" the merits of its own prior decision in *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W.2d 386 (1983), a decision issued over twenty years ago. Procedurally, that decision is not before this court and is no part of this litigation. Even if this court were to somehow find a procedural avenue to create a "new" rule banning

all testimony in state court in which a witness has been hypnotized at any point prior to trial, that rule should not be retroactively applied to reverse Armstrong's conviction on the ground that, under the new rule, Oriebia's testimony was improperly admitted.

Moreover, this court was well aware in 1983 of all of the risks pointed out by WACDL. A few new studies and cases in other jurisdictions do not create a "new" and significant issue. If the time is right to reconsider the admissibility of testimony by a witness who has been hypnotized at any point prior to trial, that is a job for the legislature or this court in its rule-making capacity. It is certainly not an appropriate venture for this court to undertake in the context of Armstrong's case.

5. The State has no per se objection to the motion for extension of time WACDL filed simultaneously with its motion to file a brief in support of the petition for review. The State does note, however, that if the issues raised by WACDL are indeed critical and pervasive, it is surprising that WACDL was not even aware of this matter until one day prior to the due date of its motion.

For all of the reasons stated herein, as well as the reasons presented in its response to Armstrong's petition for review, the State asks this court to deny Armstrong's petition for review.

Dated this 29th day of July, 2004.

Respectfully submitted,

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