

STATE OF WISCONSIN  
IN SUPREME COURT  
Case Nos. 01-2789, 02-2979

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH D. ARMSTRONG,

Defendant-Appellant-Petitioner.

---

**NON-PARTY BRIEF OF THE WISCONSIN  
INNOCENCE PROJECT OF THE FRANK J.  
REMINGTON CENTER, UNIVERSITY OF  
WISCONSIN LAW SCHOOL**

---

KEITH A. FINDLEY  
Bar No. 01019121

JOHN A. PRAY  
Bar No. 1012149

BYRON C. LICHSTEIN  
Bar No. 1048483

ALEC DOBSON  
Law Student

*Amicus Curiae*  
Wisconsin Innocence Project  
Frank J. Remington Center  
University of Wisconsin Law School  
975 Bascom Mall  
Madison, WI 53706  
(608) 262-4763

## TABLE OF CONTENTS

ARGUMENT .....	1
I. WISCONSIN COURTS HAVE AUTHORITY TO CONSIDER NEW EVIDENCE OF INNOCENCE.....	1
II. TO PROVIDE AN ADEQUATE REMEDY FOR THE WRONGLY CONVICTED, THE COURT SHOULD CLARIFY THE STANDARDS FOR GRANTING NEW TRIALS BASED ON NEWLY DISCOVERED EVIDENCE.....	6
A. The law is confused on the various standards for granting a new trial.....	6
B. A strictly “outcome-determinative” standard should not be required in criminal cases, at least where the new evidence establishes that “false evidence” was presented at trial.....	8
C. The Court of Appeals erred by layering a “clear and convincing” evidence standard on top of the “reasonable probability of a different outcome” standard.....	10
CONCLUSION .....	11

## TABLE OF AUTHORITIES

### Cases

<i>Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. 2003) .....	2
---	---

<i>Caldwell v. State</i> , 603 S.E.2d 506 (Ga. Ct. App. 2004).....	11
<i>Commonwealth v. D'Amato</i> , 856 A.2d 806 (Pa. 2004).....	11
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993) .....	1, 2, 5
<i>Holmes v. Court of Appeals</i> , 885 S.W.2d 389 (Tex. Crim. App. 1994) .....	2
<i>In re Clark</i> , 855 P.2d 729 (Cal. 1993).....	2
<i>In re Winship</i> , 397 U.S. 358 (1970) .....	9
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995) .....	7
<i>Mills v. State</i> , 786 So.2d 547 (Fla. 2001) .....	11
<i>People v. Cress</i> , 664 N.W.2d 174 (Mich. 2003) .....	11
<i>People v. Delgado</i> , 851 P.2d 811 (Cal. 1993).....	11
<i>People v. Deloney</i> , 793 N.E.2d 189 (Ill. Ct. App. 2003).....	11
<i>People v. Washington</i> , 665 N.E.2d 1330 (Ill. 1996).....	3
<i>People v. Wong</i> , 784 N.Y.S.2d 158 (N.Y. App. Div. 2004).....	11

<i>State ex rel. Booker v. Schwarz</i> , 2004 WI App 50, 270 Wis.2d 745, 678 N.W.2d 361.....	6
<i>State v. Avery</i> , 213 Wis.2d 228, 570 N.W.2d 573 (Ct. App. 1997) .....	passim
<i>State v. Bembenek</i> , 140 Wis.2d 248, 409 N.W.2d 432 (Ct. App. 1987) .....	passim
<i>State v. Coogan</i> , 154 Wis.2d 387, 453 N.W.2d 186 (Ct. App. 1990) .....	6
<i>State v. Fosnow</i> , 2001 WI App 2, 240 Wis.2d 699, 624 N.W.2d 883.....	6
<i>State v. Langston</i> , 53 Wis.2d 228, 191 N.W.2d 713 (1971) .....	3
<i>State v. McCallum</i> , 208 Wis.2d 463, 561 N.W.2d 707 (1997) .....	10, 11
<i>State v. O'Brien</i> , 223 Wis.2d 303, 588 N.W.2d 8 (1999) .....	7
<i>State v. Pitsch</i> , 124 Wis.2d 628, 369 N.W.2d 711 (1985) .....	7
<i>State v. Stewart</i> , 2004 Ohio 4073 (Ohio Ct. App.).....	11
<i>State v. Thiel</i> , 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305.....	7
<i>State v. Ways</i> , 850 A.2d 440 (N.J. 2004) .....	11

<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	7, 8
<i>Summage v. State</i> , 579 N.W.2d 821 (Iowa 1998) .....	11
<i>Summerville v. Warden</i> , 641 A.2d 1356 (Conn. 1994) .....	2
<i>United States v. Bagley</i> , 473 U.S. 667 (1985) .....	7
<i>United States v. Agurs</i> , 427 U.S. 97 (1976) .....	9
<i>Wallace v. State</i> , 106 S.W.3d 103 (Tex. Crim. App. 2003) .....	11
<i>Woodruff v. State</i> , 608 N.W.2d 881 (Minn. 2000) .....	11

**Wisconsin Statutes**

805.15 .....	8
805.15(3) .....	8
805.16(4) .....	4
805.16(5) .....	4, 6
974.06 .....	passim
974.06(1) .....	3
974.07 .....	3, 6

## Other Authorities

- 2001 Wisconsin Act 16 .....4
- Arleen Anderson, “Responding to the Challenge of Actual Innocence Claims After *Herrera v. Collins*,” 71 *Temp.L.Rev.* 489 (1995).....2
- Keith A. Findley, “New Laws Reflect the Power and Potential of DNA,” *Wisconsin Lawyer* 19 (May 2002) .....4, 8
- Samuel R. Gross et al., *Exonerations in the United States: 1989-2003*, available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>.....5
- State of Wisconsin, Office of the Governor, *Application for Executive Clemency*, available at [http://www.wisconsin.gov/PDF\\_Files/Doyle%20Pardon%20Packet.pdf](http://www.wisconsin.gov/PDF_Files/Doyle%20Pardon%20Packet.pdf) .....5
- Laura Denvir Stith, “A Contrast of State and Federal Court Authority to Grant Habeas Relief,” 38 *Val.U.L.Rev.* 421 (2004) .....2, 3
- George C. Thomas et al., “Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence,” 64 *U.Pitt.L.Rev.* 263 (2003).....2

## ARGUMENT

### I. WISCONSIN COURTS HAVE AUTHORITY TO CONSIDER NEW EVIDENCE OF INNOCENCE.

The State argues that Wisconsin courts lack authority to consider new evidence of innocence in postconviction proceedings under Wis. Stat §974.06. The State argues that, under *Herrera v. Collins*, 506 U.S. 390 (1993), new evidence of innocence “does not state a claim of a violation of a constitutional right” (State’s Brief at 4-5). Because motions under §974.06 traditionally have been limited to jurisdictional or constitutional claims, the State contends, a claim of innocence based on new evidence does not present a claim “cognizable under §974.06” (State’s Brief at 5). Accordingly, the State asks that this Court overrule *State v. Bembenek*, 140 Wis.2d 248, 409 N.W.2d 432 (Ct. App. 1987), which recognizes a due process right to present newly discovered evidence under §974.06.

Apparently, the State sees no avenue for judicial relief for innocent people (at least those without DNA evidence), suggesting instead that, after *Herrera*, the “recourse for a prisoner claiming innocence based on newly discovered evidence is executive clemency” (State’s Brief at 5).

The State’s argument—which would preclude judicial relief to demonstrably innocent people—is wrong for three reasons.

First, *Herrera* does not hold that due process never demands a right to present new evidence of innocence. *Herrera* does hold that “[c]laims of actual innocence based

on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.” 506 U.S. at 400. But *Herrera* also expressly assumes that “a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional....” *Id.* at 417. Elsewhere in *Herrera*, the Court makes clear that the due process clause imposes identical standards in non-capital cases. *Id.* at 405. Under *Herrera*, “a sufficient showing of probable innocence triggers a due process right to a judicial hearing on newly discovered evidence, whenever it becomes available.” George C. Thomas et al., “Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence,” 64 U.Pitt.L.Rev. 263, 286 (2003).

Second, to the extent that *Herrera* limits the due process right to present new evidence, *Herrera* is a federal habeas corpus case, and does not limit a state court’s authority to consider newly discovered evidence under state law. *Herrera* is grounded to a great extent on the dual principles of federalism and finality that caution against federal intervention in state cases. See Arleen Anderson, “Responding to the Challenge of Actual Innocence Claims After *Herrera v. Collins*,” 71 Temp.L.Rev. 489, 494 (1995); Laura Denvir Stith, “A Contrast of State and Federal Court Authority to Grant Habeas Relief,” 38 Val.U.L.Rev. 421, 425-27 (2004). Accordingly, other state courts have interpreted their own postconviction procedures or constitutions to permit free-standing claims of actual innocence based upon newly discovered evidence. See Stith, *supra*, at 433; *Amrine v. Roper*, 102 S.W.3d 541, 546-47 (Mo. 2003); *In re Clark*, 855 P.2d 729, 760 (Cal. 1993); *Summerville v. Warden*, 641 A.2d 1356, 1369 (Conn. 1994);



*Holmes v. Court of Appeals*, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); *People v. Washington*, 665 N.E.2d 1330, 1335 (Ill. 1996).

Similarly, this Court should recognize that Wisconsin courts can consider newly discovered evidence. Indeed, federal court reluctance to consider actual innocence means that state courts now “shoulder most of the responsibility for post-conviction claims of actual innocence, especially in non-capital cases.” Stith at 437.

Third, although Wisconsin’s due process clause should provide such a right, this Court need not address the constitutional question because the legislature has codified *Bembenek* and created a *statutory* right to present newly discovered evidence. Nothing in the language of §974.06 limits the statute to jurisdictional and constitutional claims. Section 974.06(1) provides, in part, that a prisoner may move for postconviction relief if his or her “sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state...or is otherwise subject to collateral attack...” Nonetheless, this Court has interpreted the statute to limit it to jurisdictional and constitutional claims so that collateral attacks will not render the deadlines for direct appeals meaningless. See *State v. Langston*, 53 Wis.2d 228, 231-32, 191 N.W.2d 713 (1971). Because the limitation to jurisdictional and constitutional claims reflects merely an interpretation of §974.06, the legislature is free to amend and expand the scope of the statute. The legislature has done just that.

In 2001 the legislature addressed the problem of wrongful convictions and recognized the need to permit new evidence of innocence. Most prominently, the legislature

created Wis. Stat. §974.07, providing a right to postconviction DNA testing and appropriate relief based on exculpatory DNA results “[a]t any time.” At the same time, the legislature also addressed newly discovered evidence claims based on other types of evidence. Prior to the 2001 amendments, Wis. Stat. §805.16(4) provided that, at least in civil cases, “a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict.” The 2001 amendments added §805.16(5), which provides: “The time limits in this section for filing motions do not apply to a motion for a new trial based on newly discovered evidence that is brought under s. 974.06.” See 2001 Wisconsin Act 16.

By this language the legislature plainly expressed its intent to permit the use of §974.06 to present newly discovered evidence. This new language would be meaningless if it did not mean that §974.06 is a vehicle for requesting a new trial based on newly discovered evidence. As noted shortly after the statute was drafted:

In *State v. Bembenek*...the court of appeals had held that ‘due process may require granting a new trial under sec. 974.06, Stats.,...on the basis of evidence discovered after the time for bringing postverdict motions has passed.’ The new statute codifies *Bembenek*, both to the extent that it recognizes the propriety of seeking a new trial based on newly discovered evidence in a criminal case under section 974.06 and in its holding that motions for a new trial based on newly discovered evidence are not time bound.

Keith A. Findley, “New Laws Reflect the Power and Potential of DNA,” *Wisconsin Lawyer* 19, 58 (May 2002).

Thus, regardless of whether there is a due process right

to present new evidence under §974.06, the legislature has provided that §974.06 is an appropriate vehicle for seeking a new trial based on newly discovered evidence.

This only makes sense. If the State were correct, only people claiming innocence based on DNA testing could obtain relief in Wisconsin courts; all other new evidence—no matter how compelling—would be off-limits if discovered more than a year after verdict. Countless innocent people whose cases lack DNA evidence would have no judicial remedy. A recent survey counted 328 known exonerations between 1989 and 2003—which the authors concluded represented only the tip of the iceberg. Samuel R. Gross et al., *Exonerations in the United States: 1989-2003*, available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>. Of that total, most (183 of 328) were exonerated by non-DNA evidence. *Id.* The exonerees served an average of over ten years in prison. *Id.* The State would shut the courthouse doors to most of these innocent people.

It is no answer to suggest that clemency—an act of grace by the executive branch—is available to these innocent people. As Justice Blackmun observed in *Herrera*, “If the exercise of a legal right turns on ‘an act of grace,’ then we no longer live under a government of laws.” 506 U.S. at 440 (Blackmun, J., dissenting). In any event, in Wisconsin, except in extraordinary circumstances, individuals still in prison or on parole are not even eligible to apply for a pardon. State of Wisconsin, Office of the Governor, *Application for Executive Clemency*, available at [http://www.widoc.com/PDF\\_Files/Doyle%20Pardon%20Packet.pdf](http://www.widoc.com/PDF_Files/Doyle%20Pardon%20Packet.pdf). Even if pardoned, they still are deemed to have been convicted of the crime. *Id.*

*Bembenek* therefore should not be overruled. It is an established part of Wisconsin law and has served the state well. See *State v. Fosnow*, 2001 WI App 2, ¶8 n.5, 240 Wis.2d 699, 624 N.W.2d 883 (“The state concedes that Fosnow’s claim of ‘newly discovered evidence’ raises a due process issue cognizable under Wis. Stat. §974.06...”); *State v. Avery*, 213 Wis.2d 228, 233-34, 570 N.W.2d 573 (Ct. App. 1997); *State v. Coogan*, 154 Wis.2d 387, 394, 453 N.W.2d 186 (Ct. App. 1990); *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶13, 270 Wis.2d 745, 678 N.W.2d 361 (the *Bembenek* due process right to present newly discovered evidence applies in probation revocation proceedings).

Because *Bembenek* is good law and policy, the legislature has now codified it. Wisconsin courts have express authority under both Wis. Stat. §974.07 (DNA cases) and §§974.06 and 805.16(5)(other types of evidence) to consider newly discovered evidence.

**II. TO PROVIDE AN ADEQUATE REMEDY FOR THE WRONGLY CONVICTED, THE COURT SHOULD CLARIFY THE STANDARDS FOR GRANTING NEW TRIALS BASED ON NEWLY DISCOVERED EVIDENCE.**

**A. The law is confused on the various standards for granting a new trial.**

Under Wisconsin case law, a prisoner seeking a new trial based on newly discovered evidence of innocence must satisfy five prongs: (1) The evidence must have been discovered after trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material; (4) the evidence must not be merely cumulative; and (5) it must be *reasonably probable* that a different result

would be reached at a new trial. *Bembenek* at 252 (emphasis added).

The language in the fifth prong—“reasonably probable”—has a specific meaning in the law. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). This Court has adopted this definition in several contexts. *E.g.*, *State v. O’Brien*, 223 Wis.2d 303, 321, 588 N.W.2d 8 (1999)(postconviction discovery); *State v. Thiel*, 2003 WI 111, ¶20, 264 Wis.2d 571, 665 N.W.2d 305 (ineffective assistance). And this Court has explicitly held that the standard is not outcome-determinative; the defendant need not show “by a preponderance of the evidence” that any error “determined the outcome.” *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985).

Unfortunately, this established meaning of “reasonable probability” was muddled in *State v. Avery*, 213 Wis.2d 228, 570 N.W.2d 573 (Ct. App. 1997). The Court of Appeals held that “reasonable probability” in the context of newly discovered evidence is a more demanding standard, suggesting a defendant must prove a different outcome. The Court of Appeals overlooked the significance of the adjective “reasonable” in the formulation. As the U.S. Supreme Court has said, “the adjective is important.... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Kyles*, 514 U.S. at 434.

This Court should clarify the law and reaffirm that a “probability” of a different outcome and a “reasonable probability” of a different outcome have two distinct meanings—the first is outcome-determinative, and the latter is not. A “reasonable probability” merely means a probability sufficient to undermine confidence in the outcome.

**B. A strictly “outcome-determinative” standard should not be required in criminal cases, at least where the new evidence establishes that “false evidence” was presented at trial.**

Wisconsin applies different standards for new trials in criminal and civil cases. Wisconsin Statute §805.15(3) establishes the rule for civil cases, which is identical to that for criminal cases, except that the last prong provides: “the new evidence would *probably* change the result” (emphasis added). The civil statute thus speaks in terms of an outcome-determinative probability of a different result.

Criminal cases are not judged by this outcome-determinative standard, but by the less restrictive “reasonable probability” standard.<sup>1</sup> *Bembenek*, 140 Wis.2d at 252. This less restrictive standard is appropriate and consistent with the different burdens of proof in civil and criminal cases. While the plaintiff in a civil case typically must show only a preponderance of the evidence, the state must prove its case

---

<sup>1</sup> The State cites the Findley article for the proposition that the new DNA statute requires a defendant to prove that the new DNA evidence would produce a different outcome. That article does note that “presumably” the DNA statute did not intend to alter the outcome-determinative standard in §805.15, the civil statute. The article also notes, however, that the DNA statute does not define a standard for granting a new trial in DNA cases, but does use the *Strickland* “reasonable probability” standard for determining whether to order DNA testing, which “generally is understood not to be outcome determinative...” Findley at 58, 61.

beyond a reasonable doubt. The criminal standard is higher because the defendant “has at stake interests of immense importance” as “he may lose his liberty upon conviction.” *In re Winship*, 397 U.S. 358, 363 (1970). In postconviction motions for a new trial, the prisoner’s “immense” liberty interest likewise dictates that the new evidence standard be more favorable than would be required in a civil case.

It is true that other jurisdictions impose an outcome-determinative test for new trials based on newly discovered evidence. See *United States v. Agurs*, 427 U.S. 97, 111 n.19 (1976). Wisconsin, however, is not bound by those other jurisdictions, and would be well-served by retaining the *Bembenek* “reasonable probability” standard. The recent nationwide wave of wrongful convictions demonstrates that courts convict innocent people much more frequently than previously believed, and suggests that courts should be more open to claims of newly discovered evidence. This trend was not yet realized in Wisconsin when the *Avery* court adopted a more stringent test to deny freedom to a man we now know was innocent. In light of the newly demonstrated fallibility of our criminal justice system, this Court should repudiate *Avery*’s insinuation that evidence of innocence must satisfy an outcome-determinative standard.

This is especially true in cases where the State presented or argued demonstrably false facts at trial. Although such a trial may have been free of procedural error, the false facts would have given the State an improper advantage. Fairness demands that, in such cases, courts rebalance the scales of justice by using a less stringent standard for the motion for a new trial. At least in cases involving false facts at trial, newly discovered evidence need not be outcome-determinative. Either, as Armstrong

proposes, the state should bear the burden of proving harmless error, or at least the defendant should be entitled to a new trial upon establishing a “reasonable probability” of a different outcome—a probability sufficient to “undermine confidence” in the previous judgment.

**C. The Court of Appeals erred by layering a “clear and convincing” evidence standard on top of the “reasonable probability of a different outcome” standard.**

In this case, the Court of Appeals was correct in holding that the defendant must prove the first four prongs of the newly discovered evidence standard by “clear and convincing” evidence. But the court erred by extending that standard to the final prong—the ultimate legal question of whether the new evidence creates a reasonable probability of a different outcome.

The Court of Appeals relied on *Avery*, which held that the “clear and convincing” burden does apply to the “reasonable probability” factor because “the fact-finder necessarily needs a standard.” 213 Wis.2d at 236. But the *Avery* court overlooked the fact that the “reasonable probability” factor is itself a burden of proof.

This Court in *State v. McCallum* explained that the “clear and convincing” burden does not apply to the “reasonable probability” of a different outcome prong. 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). *McCallum* notes that the first four factors must be proved by “clear and convincing” evidence. *Id.* *McCallum* then shows that the final factor establishes its own standard of proof: “If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine



whether a reasonable probability exists that a different result would be reached in a trial.” *Id.*

Layering “clear and convincing” on top of “reasonable probability” produces an incomprehensible double burden. As shown above, the “reasonable probability” standard itself means a showing less than “more likely than not.” It makes no sense to require a defendant to prove by clear and convincing evidence (significantly more likely than not) that it is reasonably probable (less than “more likely than not”) that the new evidence would create a different outcome.

It is not surprising then, that other jurisdictions are in accord with *McCallum* and do not layer an additional burden of proof on top of the final factor.<sup>2</sup> *Avery*’s flawed approach contradicts *McCallum* and the rule from other states.

## CONCLUSION

This Court should reaffirm that Wisconsin courts may consider newly discovered evidence under §974.06, and hold that the “clear and convincing” evidence standard does not apply to the “reasonable probability of a different outcome” inquiry, and that in criminal cases, including—at the very least—cases in which the state presented what turned out to be “false evidence,” the standard is not outcome-

---

<sup>2</sup> This is the rule in nearby states and the remaining 10 most populous states. See *People v. Delgado*, 851 P.2d 811, 821 (Cal. 1993); *Mills v. State*, 786 So.2d 547, 549 (Fla. 2001); *Caldwell v. State*, 603 S.E.2d 506, 509 (Ga. Ct. App. 2004); *People v. Deloney*, 793 N.E.2d 189, 194 (Ill. Ct. App. 2003); *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998); *Woodruff v. State*, 608 N.W.2d 881, 888 (Minn. 2000); *People v. Cress*, 664 N.W.2d 174, 182 (Mich. 2003); *State v. Ways*, 850 A.2d 440, 449 (N.J. 2004); *People v. Wong*, 784 N.Y.S.2d 158, 159-60 (N.Y. App. Div. 2004); *State v. Stewart*, 2004 Ohio 4073, ¶29 (Ohio Ct. App.); *Commonwealth v. D’Amato*, 856 A.2d 806, 823-24 (Pa. 2004); *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003).

determinative.

Dated this 21<sup>st</sup> day of February, 2005.

Respectfully submitted,

KEITH A. FINDLEY  
Bar No. 1012149

JOHN A. PRAY  
Bar No. 01019121

BYRON C. LICHSTEIN  
Bar No. 1048483

ALEC DOBSON  
Law Student

*Amicus Curiae*  
Wisconsin Innocence Project  
Frank J. Remington Center  
University of Wisconsin Law School  
975 Bascom Mall  
Madison, WI 53706  
(608) 262-4763

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2999 words.

---

Keith A. Findley