No. _____

IN THE

Supreme Court of the United States

DOUGLAS PRADE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Ninth District Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

With a single exception, criminal defendants in the United States seeking a new trial based on newly discovered evidence are required to establish only that the new evidence makes it more likely than not that, in a new trial, they would be acquitted. This is not only the near universal practice today, it also is the historical practice dating back far into the nineteenth century.

The exception is Ohio. Under Ohio's common law, criminal defendants with newly discovered evidence are granted a new trial only if they provide clear and convincing evidence that, in a new trial, they would be acquitted.

When there is newly discovered evidence making it more likely than not that, in a new trial, the defendant would be acquitted, does it violate the Fourteenth Amendment's Due Process Clause to deny a new trial based on Ohio's uniquely elevated burden of proof?

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner is Douglas Prade, an individual. He was the appellant below.

Respondent is the State of Ohio. It was the appellee below.

Court of Common Pleas, Summit County, Ohio: *Ohio v. Prade*, No. CR 1998-02-0463 (judgment on jury verdict entered Sept. 24, 1998; order denying application for testing under Ohio DNA testing statute entered May 2, 2005; order denying application for testing under amended Ohio DNA testing statute entered June 2, 2008; order exonerating defendant and, in the alternative, granting new trial motion entered Jan. 29, 2013; order denying defendant's new trial motion entered Mar. 11, 2016).

Ohio Ninth District Court of Appeals: *Ohio v. Prade*, No. CA 19327 (Aug. 23, 2000, judgment affirming conviction); *Ohio v. Prade*, Ct. App. No. CA 22718 (June 16, 2005, judgment affirming May 2, 2005, trial court order denying defendant's application for testing under Ohio DNA testing statute); *Ohio v. Prade*, No. CA 24296 (Feb. 18, 2009, judgment affirming June 2, 2008, trial court order denying defendant's application for testing under amended Ohio DNA testing statute); *Ohio v. Prade*, No. CA 26775 (Mar. 19, 2014, judgment reversing January 29, 2013, trial court order exonerating defendant); *Ohio v. Prade*, No. CA 26814 (Mar. 27, 2013, journal entry dismissing Ohio's first appeal from January 29, 2013, trial court order granting new trial); *Ohio v. Prade*, No. CA 27323 (Aug. 14, 2014, journal entry dismissing Ohio's second appeal from January 29, 2013, trial

court order granting a new trial); *Ohio v. Prade*, No. CA 28193 (Sept. 5, 2018, judgment affirming March 11, 2016, trial court order denying defendant's new trial motion).

Ohio Supreme Court: *Ohio v. Prade*, No. 2000-1782 (Dec. 29, 2000, order denying discretionary review of Ct. App. No. CA 19237); *Ohio v. Prade*, No. 2005-1408 (Oct. 26, 2005, order denying discretionary review of Ct. App. No. CA 22718); *Ohio v. Prade*, No. 2009-0605 (May 4, 2010, judgment reversing Ct. App. No. 24296); *Ohio v. Prade*, No. 2014-0432 (July 23, 2014, order denying discretionary review of Ct. App. No. 26775); *Ohio v. Prade*, Sup. Ct. No. 2014-1992 (Apr. 29, 2015, order denying discretionary review of Ct. App. No. 27323); *Ohio ex rel. Prade v. Ninth Dist. Ct. App., Hon. Christine Croce*, No. 0686 (Sept. 20, 2017, judgment denying writ in original action seeking writ of prohibition); *Ohio v. Prade*, No. 2019-00019 (Mar. 20, 2019, order denying discretionary review of Ct. App. No. CA 28193).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Douglas Prade respectfully petitions for a writ of certiorari to review the judgment of the Ohio Ninth District Court of Appeals in this case.

OPINIONS BELOW

The trial court's denial of Mr. Prade's motion for a new trial (Pet. App. 40a–64a) is unpublished. The Ohio Ninth District Court of Appeals' decision and journal entry entering judgment affirming the trial court's denial of the motion for a new trial (Pet. App. 1a–34a) is reported at 107 N.E.3d 1268. The Ohio Supreme Court's decision declining to accept jurisdiction over Mr. Prade's appeal (Pet. App. 35a) is reported at 119 N.E.3d 434.

JURISDICTION

The Ohio Supreme Court declined to accept jurisdiction over Mr. Prade's appeal on March 20, 2019. *See* Pet. App. 35a. On May 30, 2019, Justice Sotomayor extended the time to file a certiorari petition until August 19, 2019. *See* No. 18A1243. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This petition presents the question of what burden of proof applies when a criminal defendant brings a new trial motion based on newly discovered evidence—*i.e.*, new, material evidence that was unavailable at the time of the original trial and might result in acquittal in a new trial.[1] Mr. Prade provided the postconviction trial court below with significant new evidence of his innocence—(1) new DNA test results excluding him from male DNA found over where the killer bit the victim and (2) scientific advances that eviscerate and would require excluding the State's forensic dentists' trial opinions tying Mr. Prade's teeth to the killer's bite mark on the victim's arm. Nonetheless, he may never have the opportunity to have a jury untainted by "junk science" consider the new, exculpatory DNA evidence because the lower courts denied his new trial motion based on Ohio's clear and convincing burden of proof—an elevated burden that is unique to Ohio.

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[1] In Ohio (and elsewhere), and apart from the likely impact of newly discovered evidence on the outcome of a new trial, newly discovered evidence must also have been (1) discovered after the trial, (2) not discoverable through due diligence before the trial, (3) material, (4) not merely cumulative, and (5) not merely impeaching or contradicting of former evidence. *Ohio v. Petro*, 76 N.E.2d 370, syllabus (Ohio 1947). Those requirements are not at issue here, and this petition's references to "newly discovered evidence" are intended to refer to evidence that satisfies these five other requirements. Ohio and other jurisdictions also impose time limits on new trial motions, but it is undisputed that the new trial motion here was timely because Mr. Prade was "unavoidably prevented from discovering the evidence" within the otherwise applicable 120-day period. Ohio R. Crim. P. 33(B). *See* Pet. App. 102a–103a.

A. The Clear And Convincing Burden Of Proof For Defendants Seeking A New Trial Based On Newly Discovered Evidence In Ohio

In the mid-nineteenth century, Ohio required defendants seeking a new trial based on newly discovered evidence to satisfy a "probable" burden of proof. *Gandolfo v. Ohio*, 11 Ohio St. 114, 119 (1860). That changed in 1917 when the Ohio Supreme Court raised the relevant burden to a "strong probability" in *Ohio v. Lopa*, 117 N.E. 319, 320 (Ohio 1917). In *Lopa*—a case where the burden of proof was neither at issue nor analyzed—the court asserted that it "has been frequently announced by this court" that, to grant a new trial based on newly discovered evidence, the trial court must find, among other things, "a strong probability that the newly discovered evidence will result in a different verdict." *Id.* *Lopa* neither discussed *Gandolfo* and its "probable" burden of proof nor cited to authority for the proposition that "strong probability" burden had been "frequently announced."

Ohio courts equate the "strong probability" burden of proof with "one of clear and convincing evidence." *Ohio v. Ayers*, 923 N.E.2d 654, 658 (Ohio Ct. App. 2009). It is "functionally equivalent to the clear and convincing evidence standard." *Ohio v. King*, 2012-Ohio-4398, ¶ 39 (Ohio Ct. App. 2012) (Stewart, J., dissenting) (citations omitted). Indeed, Ohio courts apply the two burdens together and without distinction in this context. *E.g., Ohio v. Anderson*, 2014-Ohio-1849, ¶ 16 (Ohio Ct. App. 2014) (new trial motion based on newly discovered evidence); *Ohio v. Vinzant*, 2008-Ohio-4399, ¶ 9 (Ohio Ct. App. 2008) (same); *see generally Addington v. Texas*, 441 U.S. 418,

423-24 (1979) (describing the three basic burdens of persuasion: (1) preponderance, (2) clear and convincing, and (3) beyond reasonable doubt).

In 1947, in *Ohio v. Petro*, 76 N.E.2d 370, syllabus (Ohio 1947), the Ohio Supreme Court, in a quotation from *Lopa* that was its holding,[2] again stated that defendants seeking a new trial based on newly discovered evidence must establish a "strong probability" of a different result in a new trial. In *Petro*, as in *Lopa*, the burden of proof was neither at issue nor analyzed. Over the seven decades since *Petro* was decided, *Petro*'s articulation of the requirements for criminal defendants seeking new trials have been cited literally hundreds of times, and they effectively have become "hornbook law" in Ohio courts. *See*, *e.g.*, *Ohio v. LaMar*, 767 N.E.2d 166, 196 (Ohio 2002); *Ohio v. Hawkins*, 612 N.E.2d 1227, 1235 (Ohio 1993); *Ohio v. Seiber*, 564 N.E.2d 408, 422 (Ohio 1990); *Ohio v. Lewis*, 258 N.E.2d 445, 453 (Ohio 1970).[3] Indeed, apart from the decision Mr. Prade

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[2] *Petro*'s syllabus was, in its entirety, a quotation from *Lopa*. *Petro*, 76 N.E.2d 370, syllabus (quoting *Lopa*, 117 N.E. 319). Under Ohio law until recently, only the Ohio Supreme Court's syllabus—not the accompanying opinion—states the holding. *See Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984) ("the syllabus rule of the Ohio Supreme Court . . . provides that the holding of the case appears in the syllabus, since that is the only portion of the opinion on which a majority of the court must agree") (citations omitted).

[3] For example, nine intermediate Ohio appellate court decisions decided in this calendar year cited *Petro* and quoted its "strong probability" burden of proof. *Ohio v. Simpson*, 2019-Ohio-2912, ¶ 41 (Ohio Ct. App. 2019); *Ohio v. Jordan*, 2019-Ohio-2647, ¶ 37 (Ohio Ct. App. 2019); *Ohio v. Prater*, 2019-Ohio-2535, ¶ 48 (Ohio Ct. App. 2019); *Ohio v. Tiedjen*, 2019-Ohio-2430, ¶ 26

cited in his objections to the courts below—*Ohio v. Siller*, 2009-Ohio-2874, ¶ 49 (Ohio Ct. App. 2009)—no Ohio court appears to have analyzed or questioned the "strong probability" burden of proof applicable to new trial motions. This is not surprising given Ohio's rule that "inferior court[s] must follow the controlling authority of a higher court, leaving to the higher court the prerogative of overruling its own decision." *Ohio v. Keeling*, 2015-Ohio-1774, ¶ 9 (Ohio Ct. App. 2015) (citation omitted); *accord Ohio v. Hill*, 2011-Ohio-3920, ¶ 11 (Ohio Ct. App. 2011); *Ohio v. Bedford*, 2011-Ohio-2054, ¶ 12 (Ohio Ct. App. 2011).

B. Dr. Prade's Murder and Mr. Prade's Trial and Conviction

On November 26, 1997, Dr. Margo Prade was fatally shot in her van outside her office in Akron, Ohio. No one witnessed the murder. The gun was not found. But, during the struggle, Dr. Prade's killer bit her arm so hard that, through two layers of clothing—her lab coat and blouse—his teeth left a bite mark impression on her skin.

In February 1998, Dr. Prade's ex-husband, Akron Police Captain Douglas Prade, was charged with Dr. Prade's murder. At his September 1998 trial, much of the State's case focused on the Prades' difficult relationship before and after their recent divorce. In terms of direct physical evidence, the State's DNA

(Ohio Ct. App. 2019); *Ohio v. Williamson*, 2019-Ohio-1985, ¶ 15 (Ohio Ct. App. 2019); *Ohio v. Campbell*, 2019 Ohio App. LEXIS 1999, *28 (Ohio Ct. App. 2019); *Ohio v. Barnhart*, 2019-Ohio-1184, ¶ 52 (Ohio Ct. App. 2019); *Ohio v. Hill*, 2019-Ohio-365, ¶ 86 (Ohio Ct. App. 2019); *Ohio v. Knoefel*, 2019-Ohio-267, ¶ 37 (Ohio Ct. App. 2019).

testing expert agreed that the small area of Dr. Prade's lab coat over the killer's bite mark was "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity." Pet. App. 171a. A defense dental expert testified that the killer "probably slobbered all over" the lab coat over the bite mark. Pet. App. 175a. This testimony was confirmed by both a positive test for amylase—an enzyme in saliva—and microscopic observation revealing human epithelial cells on the bite mark section of the lab coat. But, in 1998, DNA testing technology could not identify trace amounts of one person's DNA within large quantities of another person's DNA, and, here, Dr. Prade's lab coat was soaked with her blood, which meant that the 1998 DNA test results yielded no information about the killer.

"The key physical evidence at trial" was testimony from the State's two forensic dentists—odontologists—about "the bite mark that the killer made on Dr. Prade's arm through her lab coat and blouse." *Ohio v. Prade*, 930 N.E.2d 287, 288 (Ohio 2010) ("*Prade I*"). One testified that the killer's bite mark "'was made by Captain Prade'" and the other testified that the mark was "'consistent with'" Mr. Prade's teeth. *Id.* (quoting trial transcript). The State argued in closing that Mr. Prade "[a]bsolutely" made the bite mark and "[b]ecause Douglas Prade did the biting, Douglas Prade did the killing." Pet. App. 165a. Jurors interviewed on television said they could not have convicted without the bite mark. Pet. App. 141a.

The jury convicted and, on direct appeal, the Ohio Ninth District Court of Appeals affirmed, noting at length the forensic dentists' testimony that purportedly "established that the bite mark . . . was

made by defendant" in its findings on the weight and sufficiency of the evidence. *Ohio v. Prade*, 745 N.E.2d 475, 494 (Ohio Ct. App. 2000), *app. not allowed*, 739 N.E.2d 816 (Ohio 2000).

C. Post-Trial Advances in Forensic Science

Since Mr. Prade's 1998 trial, there have been two major advances in forensic science that are relevant here. First, the DNA testing method that yielded only meaningless results at the time of Mr. Prade's 1998 trial has been replaced by Y-chromosome STR or "Y-STR" testing, which has an "unparalleled ability . . . to exonerate the wrongly convicted." *Maryland v. King*, 569 U.S. 435, 442 (2013) (citation omitted). Y-STR DNA testing technology detects only the male Y-chromosome and, thus, can provide information about male DNA within large quantities of female DNA, such as the male DNA on Dr. Prade's lab coat over her killer's bite mark.

Second, odontology—the "science" underlying the State's experts' opinions tying Mr. Prade to Dr. Prade's killer's bite mark—has been proven to be highly unreliable at matching biters to bite marks on skin, and the scope of permissible bite mark identification opinions has been dramatically narrowed. The National Academies of Science concluded in 2009 for the first time that a basis for bite mark identification "has not been scientifically established." Pet. App. 160a.

Specifically, odontology's scientific premises—that (1) dentition is unique and (2) human skin records dental impressions with enough sensitivity to be accurately matched to an individual—are "not supported by foundational research" and "the only

rigorous studies are recent—and undercut the technique's validity." P. Giannelli, "*Forensic Science: Daubert's Failure*," 68 Case W. Res. L. Rev. 869, 878 (2018) (footnotes omitted). Texas imposed a moratorium on bite mark evidence in 2016. *See id.* at 880-81. A study of experts certified by the American Board of Forensic Odontology ("ABFO")—the only accrediting entity in the field—found that their bite mark opinions did not agree with one another over 95% of the time. Pet. App. 148a (¶ 13). Significantly, ABFO's guidelines now bar the bite mark opinions the State presented at Mr. Prade's 1998 trial. Pet. App. 151a (¶ 23). Indeed, they "prohibit[] individualization testimony entirely." *Ex parte Chaney*, 563 S.W.3d 239, 257 (Tex. Crim. App. 2018).

D. Newly Discovered Evidence in Mr. Prade's Case and the Rulings Below

On February 5, 2008, Mr. Prade filed an application for new DNA testing under Ohio's DNA testing statute, Ohio Rev. Code § 2953.72. The trial court denied the application because the 1998 DNA testing over the killer's bite mark that identified only the victim's DNA purportedly was a "prior definitive DNA test" that barred new DNA testing. *See* Ohio Rev. Code § 2953.74(A). The court of appeals affirmed, but the Ohio Supreme Court reversed, finding that DNA test results using outdated methods were "meaningless" and did not bar new testing that might "provide new information that [previously] was not able to be detected." *Prade I*, 930 N.E.2d 287, 290, 291.

After remand, a DNA-testing laboratory tested samples from a cutting from Dr. Prade's lab coat over the killer's bite mark that had been excised by the

FBI's forensic laboratory in early 1998 and then stored in an evidence envelope. *See* Pet. App. 70a–71a. Testing of a sample from the center of the bite mark revealed a single, partial male DNA profile from which Mr. Prade was definitively excluded as the source. *See* Pet. App. 76a. Testing of another sample consisting of the remaining extract from the first sample and extract from three other areas within the bite mark showed two partial male DNA profiles from which, again, Mr. Prade was definitively excluded. *See id*. At the State's request, the trial court then directed the State's laboratory to test samples from the lab coat outside the killer's bite mark to determine if the lab coat was contaminated with stray male DNA. That testing found no stray, contaminating DNA. *See* Pet. App. 77a-78a.

Mr. Prade then filed a petition for postconviction relief under Ohio Rev. Code § 2953.21 and, in the alternative, a motion for a new trial under Ohio R. Crim. P. 33(A)(6). Pet. App. 132a–143a; *see* Pet. App. 101a–102a. In a November 2012 evidentiary hearing, two defense DNA experts testified that Dr. Prade's killer is the most likely source of the newly discovered male DNA over the bite mark, which would mean that Mr. Prade is innocent. *See* Pet. App. 77a. The State's DNA experts testified that, although the newly discovered male DNA may be the killer's, they thought it was better explained as contamination. *See* Pet. App. 77a. A defense dental expert testified that her recent, peer-reviewed scientific articles demonstrate that bite mark identification lacks a scientific basis, and a forensic odontologist called by the State testified that, while bite mark identification can be useful in some circumstances, then-current professional

standards would not permit either of the bite mark identification opinions given at Mr. Prade's trial. *See* Pet. App. 80a–83a. In a January 29, 2013, order, the trial court found that the newly discovered evidence presented in the postconviction proceedings clearly and convincingly showed that Mr. Prade is actually innocent under Ohio Rev. Code § 2953.21(A)(1)(a) (the "Exoneration Order") and, as alternative relief, granted Mr. Prade's motion for a new trial under Ohio R. Crim. P. 33(A)(6). Pet. App. 96a–98a. He was unconditionally released from prison that day.

The State appealed the Exoneration Order, and the Ohio Ninth District Court of Appeals, purporting to review for abuse of discretion, (1) weighed and rejected the defense DNA experts' opinions that the killer was a likely source of the male DNA found over his bite mark; (2) excused the admission of the now-inadmissible bite mark identification evidence because the jury was "presented with the entire spectrum of opinions;" (3) assessed the circumstantial evidence and, unlike the actual jurors and the trial court, found it compelling; and (4) reversed. *Ohio v. Prade*, 9 N.E.3d 1072, 1075, 1102, 1104, 1106-07 (Ohio Ct. App. 2014). The Ohio Supreme Court, with three of seven justices dissenting, declined to hear Mr. Prade's appeal. *Ohio v. Prade*, 12 N.E.3d 1229 (Ohio 2014). After 17 months of freedom without condition, Mr. Prade voluntarily appeared and again was incarcerated. The State then appealed from the trial court's new trial order, but the Ohio Ninth District Court of Appeals dismissed the appeal *sua sponte*, concluding that the now-unconditional new trial order was somehow conditional. *See* Pet. App. 65a–67a.

After the postconviction trial court's Exoneration Order was reversed and its new trial order deemed non-final, a new trial court judge who succeeded the prior one upon her retirement reconsidered Mr. Prade's new trial motion. In those proceedings, while contending that the new evidence satisfied the "strong probability" standard, Mr. Prade twice objected to Ohio's "strong probability" burden of proof and argued that, based on *Siller*, 2009-Ohio-2874, ¶ 49, "the appropriate standard for a new trial under Crim.R. 33(A)(6) based on newly discovered evidence is whether the new evidence creates a reasonable probability of a different outcome or a probability that undermines confidence in the outcome of the trial." Pet. App. 130a (n.1); Pet. App. 133a–134a (n.1); *see* Pet. App. 135a–138a.

Siller found that, although the newly discovered evidence there established a "strong probability" of a different result, Ohio's "strong probability" burden of proof for criminal defendants with newly discovered evidence could not be reconciled with this Court's Due Process rulings in *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), *California v. Trombetta*, 467 U.S. 479 (1984), *United States v. Bagley*, 473 U.S. 667 (1984), and *Kyles v. Whitley*, 514 U.S. 419 (1995). *Siller*, 2009-Ohio-2874, ¶¶ 44-53. Thus, *Siller* observed that, in *Trombetta*, "the United States Supreme Court held this issue to be one of due process" and then quoted *Valenzuela-Bernal*'s observation that "'[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness'" and that this Court has "'long interpreted . . . to require that criminal

defendants be afforded a meaningful opportunity to present a complete defense.'" *Id.* ¶ 51 (citation omitted).

In an October 2015 hearing before the new postconviction trial judge on reconsideration of the prior postconviction trial judge's order granting a new trial, the four DNA experts who testified in the first hearing provided the same opinions they previously had provided. Further, and contrary to the Ninth District Court of Appeal's finding in the exoneration appeal that "there was never a shred of evidence . . . that the killer actually deposited saliva on the lab coat," *Prade*, 9 N.E.3d 1072, ¶ 117, they agreed that, in the 1998 testing of the lab coat over the bite mark, both the enzyme in saliva and human epithelial cells were identified. The trial court also considered the bite mark testimony from the November 2012 hearing and an affidavit from an odontologist, Dr. Iain Pretty, describing his recent bite mark research and explaining that, today, ABFO guidelines do not permit the bite mark opinions offered at Mr. Prade's 1998 trial. Pet. App. 148a (¶ 13), 151a (¶ 23).

In its March 11, 2016, order, the trial court applied the "strong probability" burden of proof and denied the new trial motion. Pet. App. 62a–64a. Inexplicably, the trial court found that new DNA test results excluding Mr. Prade from male DNA found over the killer's bite mark were "the same exclusion as in the 1998 criminal trial" and that the fact that the DNA testing elsewhere on the lab coat was negative somehow showed that the male DNA over the bite mark was mere contamination. Pet. App. 54a, 63a. Ignoring the request that she analyze the admissibility of the trial bite mark opinions in light of

the new scientific understanding and professional standards, the trial court determined that the "sea of changing opinions in the science of bite mark identification" was "merely additional criticism[] and/or impeachment of the testimony presented at trial." Pet. App. 51a.

Mr. Prade appealed from the denial of the new trial motion, arguing that the trial court erred in reconsidering, and abused its discretion in denying, the motion for a new trial. He again objected to the "strong probability" burden of proof, arguing that, "although [he] has met the 'strong probability' standard, 'reasonable probability' is the correct standard," again citing *Siller*. Pet. App. 127a. The intermediate Ohio appellate court affirmed. Pet. App. 1a–34a. As to the new DNA evidence, the court emphasized the burden of proof, observing that "Mr. Prade has not shown that there is a *strong probability* the new results would lead to a different outcome if introduced at a new trial." Pet. App. 22a (emphasis in original). As to the new research showing that the trial bite mark opinions have no scientific basis and the new bite mark guidelines that prohibit them, the court agreed with the trial court that they were "merely cumulative of the trial testimony or merely served to impeach or contradict portions of it." Pet. App. 31a–32a.

Despite Mr. Prade's objections, the trial and intermediate appellate courts below applied Ohio's "strong probability" burden of proof for criminal defendants with newly discovered evidence without addressing its constitutionality. Yet they had no other choice because Ohio "inferior court[s] must follow the controlling authority of a higher court, leaving to the

higher court the prerogative of overruling its own decision." *Keeling*, 2015-Ohio-1774, ¶ 9 (citation omitted); *accord Hill*, 2011-Ohio-3920, ¶ 11; *Bedford*, 2011-Ohio-2054, ¶ 12. Thus, the lower courts' failures to address Mr. Prade's objections to Ohio's "strong probability" burden of proof are unsurprising given over a century of Ohio Supreme Court controlling authority. *E.g.*, *LaMar*, 767 N.E.2d at 196 (Ohio 2002); *Hawkins*, 612 N.E.2d at 1235 (Ohio 1993); *Seiber*, 564 N.E.2d at 422 (Ohio 1990); *Lewis*, 258 N.E.2d at 453 (Ohio 1970); *Petro*, 76 N.E.2d 370, syllabus (Ohio 1947); *Lopa*, 117 N.E. at 320 (Ohio 1917).

Mr. Prade then sought discretionary review in the Ohio Supreme Court, arguing that Ohio's "strong probability" standard is "a denial of fundamental fairness and Due Process." Pet. App. 106a. The Chief Justice of the Ohio Supreme Court, Maureen O'Connor, was the county prosecutor when Mr. Prade was tried and did not participate. With two of six participating justices dissenting, the Ohio Supreme Court declined to accept jurisdiction over Mr. Prade's appeal. Pet. App. 35a.

This petition followed.

REASONS FOR GRANTING THE PETITION

Every U.S. jurisdiction other than Ohio, both federal and state, applies a preponderance (or lesser) burden of proof to new trial motions based on newly discovered evidence. And that has been the virtually universal burden since at least the first half of the nineteenth century. Because application of the preponderance standard in this context is so widespread and firmly rooted in current and historical American jurisprudence, applying a higher, clear and

convincing burden denies a fundamental right and is fundamentally unfair and, thus, violates the Due Process Clause. *See*, *e.g.*, *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996); *Schad v. Arizona*, 501 U.S. 624, 640 (1991).

Further, Ohio's clear and convincing burden of proof violates the Due Process Clause because it misallocates the risk of error. The state's interest in the finality of criminal convictions is not impaired by the preponderance standard that applies everywhere but Ohio. New trial motions based on newly discovered evidence present high threshold requirements apart from the burden of proof, including both strict time requirements for filing and mandates that the evidence could not have been discovered at the time of trial, is material, and is not merely cumulative. The universe of cases where the difference between a preponderance and clear and convincing burden of proof matters is substantial yet not unlimited, and the preponderance burden is a "high standard" that "reflects the profound importance of finality in criminal proceedings." *Strickland v. Washington*, 466 U.S. 668, 693 (1984).

On the other side of the scale, criminal defendants bringing new trial motions based on newly discovered evidence have a compelling interest in having a jury, for the first time, consider material new evidence that, by assumption, makes it more likely than not that there will be an acquittal. Ohio's clear and convincing burden of proof for new trial motions based on newly discovered evidence violates the Due Process Clause in that it runs contrary to the "societal judgment about how the risk of error should be distributed." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

Finally, this case is an ideal vehicle to correct Ohio's century-old, elevated burden of proof for new trial motions based on newly discovered evidence because the burden of proof was central to the outcome. The new DNA and bite mark identification evidence convinced the initial postconviction trial court judge not only that Mr. Prade is entitled to a new trial, but that he is actually innocent. Pet. App. 93a. Jurors from the original trial told a TV interviewer that, without the now-inadmissible bite mark identification evidence, they would not have convicted. Pet. App. 141a. Editorial boards for two major Ohio newspapers called for a new trial, as did Kenya and Sahara Prade, the victim and Mr. Prade's two children. As an Ohio Supreme Court justice observed, there is "no doubt that this case needs to go to a new jury," this case is an "astounding miscarriage of justice," and Mr. Prade is "entitled to a fair trial . . . [t]hat still has not happened, and it should." *Ohio ex rel. Prade v. Ninth Dist. Ct. App.*, 87 N.E.3d 1239, 1245-46 (Ohio 2017) (O'Neill, J., dissenting).

I. OHIO'S CLEAR AND CONVINCING BURDEN VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT IS BOTH UNIQUE AND CONTRARY TO HISTORICAL PRACTICE.

States are not obligated to provide procedures for postconviction relief, but when they do, they "must . . . act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). State criminal procedures run afoul of the Due Process Clause when they either "offend[] some principle of justice so rooted in the traditions and conscience of our

people as to be ranked as fundamental" or "transgress[] any recognized principle of fundamental fairness in operation." *Medina v. California*, 505 U.S. 437, 446, 448 (1992) (internal quotation and citation omitted).

As detailed below, Ohio's common law rule applying a clear and convincing burden of proof to criminal defendants' new trial motions based on newly discovered evidence conflicts with not only the widely shared practice today, but also with historical practice. It denies a fundamental right, is fundamentally unfair, and runs afoul of the Due Process Clause.

A. The burden of proof for new trial motions based on newly discovered evidence in state courts

For new trial motions based on newly discovered evidence, every state except Ohio applies a burden of proof that equates to either a preponderance or, in a few instances, an even lower burden. Five states apply burdens that are less than a preponderance—*i.e.*, a reasonable probability, substantial possibility, or substantial risk of a different verdict.[4] The remaining states other than Ohio apply a preponderance standard of proof—probable, probably, likely, ought to, or should have.[5]

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[4] MA: *Massachusetts v. Moore*, 109 N.E.3d 484, 504 (Mass. 2018); MD: *Yorke v. Maryland*, 556 A.2d 230, 235 (Md. Ct. App. 1989); MT: *Montana v. Clark*, 197 P.3d 977, 980 (Mont. 2008); OK: *Underwood v. Oklahoma*, 252 P.3d 221, 254-5 (Okla. Crim. App. 2011); WI: *Wisconsin v. McAlister*, 911 N.W.2d 77, 86 (Wis. 2018).

[5] AL: *Banks v. Alabama*, 845 So. 2d 9, 16 (Ala. Crim. App. 2002); AK: *Hensel v. Alaska*, 604 P.2d 222, 231 (Alaska 1979); AR: *Johnson v. Arkansas*, 515 S.W.3d 116, 118 (Ark. 2017); AZ:

Arizona v. Valenzuela, 426 P.3d 1176, 1193-94 (Ariz. 2018); CA: *California v. O'Malley*, 365 P.3d 790, 844 (Cal. 2016); CO: *Farrar v. Colorado*, 208 P.3d 702, 707 (Colo. 2009); CT: *Asherman v. Connecticut*, 521 A.2d 578, 581 (Conn. 1987); DE: *Hicks v. Delaware*, 913 A.2d 1189, 1194 (Del. 2006); FL: *Sweet v. Florida*, 248 So. 3d 1060, 1068 (Fla. 2018); GA: *Anthony v. Georgia*, 807 S.E.2d 891, 896 (Ga. 2017); HI: *Hawaii v. Caraballo*, 615 P.2d 91, 93 (Haw. 1980); IA: *Moon v. Iowa*, 911 N.W.2d 137, 151 (Iowa 2018); ID: *Idaho v. Drapeau*, 551 P.2d 972, 978 (Idaho 1976); IL: *Illinois v. Molstad*, 461 N.E.2d 398, 402 (Ill. 1984); IN: *Kubsch v. Indiana*, 934 N.E.2d 1138, 1145 (Ind. 2010); KS: *Beauclair v. Kansas*, 419 P.3d 1180, 1189 (Kan. 2018); KY: *Kentucky v. Clark*, 528 S.W.3d 342, 344-45 (Ky. 2017); LA: *Louisiana v. McKinnies*, 171 So. 3d 861, 868 (La. 2014); ME: *Maine v. Twardus*, 72 A.3d 523, 531-32 (Me. 2013); MI: *Michigan v. Grissom*, 821 N.W.2d 50, 63 (Mich. 2012); MN: *Minnesota v. Fort*, 768 N.W.2d 335, 344 (Minn. 2009); MO: *Missouri v. Taylor*, 589 S.W.2d 302, 305 (Mo. 1979); MS: *Roach v. Mississippi*, 116 So. 3d 126, 131 (Miss. 2013); NC: *North Carolina v. Rhodes*, 743 S.E.2d 37, 39 (N.C. 2013); ND: *Kovalevich v. North Dakota*, 915 N.W.2d 644, 646 (N.D. 2018); NE: *Nebraska v. Oldson*, 884 N.W.2d 10, 69 (Neb. 2016); NH: *New Hampshire v. Breest*, 155 A.3d 541, 549 (N.H. 2017); NJ: *New Jersey v. Herrerra*, 48 A.3d 1009, 1030 (N.J. 2012); NM: *New Mexico v. Garcia*, 125 P.3d 638, 640 (N.M. 2005); NV: *Sanborn v. Nevada*, 812 P.2d 1279, 1284-85 (Nev. 1991); NY: *New York v. Marino*, 99 A.D.3d 726, 730, 951 N.Y.S.2d 740 (2012); OR: *Oregon v. Arnold*, 879 P.2d 1272, 1276 (Ore. 1994); PA: *Pennsylvania v. Pagan*, 950 A.2d 270, 292 (Pa. 2008); RI: *Rhode Island v. Drew*, 79 A.3d 32, 38 (R.I. 2013); SC: *South Carolina v. Mercer*, 672 S.E.2d 556, 565 (S.C. 2009); SD: *South Dakota v. Corean*, 791 N.W.2d 44, 51 (S.D. 2010); TN: *Tennessee v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994); TX: *Texas v. Arizmendi*, 519 S.W.3d 143, 148-49 (Tex. Crim. App. 2017); UT: *Utah v. Pinder*, 114 P.3d 551, 564 (Utah 2005); VA: *Avent v. Virginia*, 688 S.E.2d 244, 261 (Va. 2010); VT: *Vermont v. Schreiner*, 944 A.2d 250, 257 (Vt. 2007); WA: *Washington v. Mullen*, 259 P.3d 158, 171 (Wash. 2011); WV: *West Virginia v. Daniel M.*, No. 17-0714, 2018 W. Va. LEXIS 759, *17 (W. Va. Nov. 17, 2018); WY: *Lindstrom v. Wyoming*, 368 P.3d 896, 899 (Wyo. 2016).

Further, applying the preponderance standard to new trial motions based on newly discovered evidence has been the widespread practice in state courts in criminal and civil actions since at least the first half of the nineteenth century. *See*, *e.g.*, *Moore v. Philadelphia Bank*, 5 Serg. & Rawle 41, 42 (Pa. 1819) (new trial warranted when newly discovered evidence "would probably produce a different verdict"); *Bullock v. Beach & Cloys*, 3 Vt. 73, note (1830) (new trial warranted when newly discovered evidence "will probably produce a different result"); *Rulon v. Lintol's Heirs*, 3 Miss. 891, 892 (1838) (new trial warranted when newly discovered evidence "would probably produce a different verdict"); *Turnley v. Evans*, 22 Tenn. 222, 224 (1842) (new trial warranted when newly discovered evidence makes it "probable, from the whole case, that if the evidence in question had been before the jury, a different verdict would have been rendered"); *Louisiana v. Hornsby*, 8 Rob. 554, 556 (La. 1844) (new trial warranted when the newly discovered evidence "appear[s] to the court to be such as might probably produce a different verdict"); *Giles v. Georgia*, 6 Ga. 276, 287 (1849) (new trial warranted when newly discovered evidence would "likely produce a different result"); *Missouri v. McLaughlin*, 27 Mo. 111, 112 (1858) (new trial warranted when newly discovered evidence "probably produce a different result").[6]

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[6] *Accord Watts v. Johnson*, 4 Tex. 311, 319 (1849) (new trial warranted when the newly discovered evidence "would probably change the result upon a new trial") (citation omitted); *Hoyt v. Saunders*, 4 Cal. 345, 348 (1854) (new trial warranted when "the result" with newly discovered evidence "in all probability, would have been different"); *Ruhe v. Abren*, 1 N.M. 247, 250 (1857) (new

As the Georgia Supreme Court noted in 1851, there then was "pretty general concurrence of authority . . . that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court" that, among other things, the new evidence "is so material that it would probably produce a different verdict." *Berry v. Georgia*, 10 Ga. 511, 527-29 (1851). Similarly, a pre-Civil War treatise explained that, to warrant a new trial, newly discovered evidence "must be so material that it would probably produce a different verdict if the new trial were granted." 3 D. Graham & T.W. Waterman, *Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials*, ch. XII(3)(c) at 1015 (2d ed. Banks, Gould & Co. 1855).

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trial warranted when the newly discovered evidence "would probably have produced a different result"); *Bronson v. Hickman*, 10 Ind. 3, 4 (1857) (new trial warranted when the newly discovered evidence would "probably produce a different result"); *Welles v. Harris*, 31 Conn. 365, 370 (1863) (new trial warranted when the newly discovered evidence is "sufficient probably to produce a different result") (citation omitted); *McCrone v. Eves*, 8 Del. (1 Houst.) 76, 77 (Del. Super. Ct. 1864) (new trial warranted when the newly discovered evidence "would probably produce a different verdict"); *McClusky v. Gerhauser*, 2 Nev. 47, 53 (1866) (new trial warranted when it is "probable that the newly-discovered evidence will produce a different result"); *Conradt v. Sixbee*, 21 Wis. 383, 384-85 (1867) (new trial warranted when the newly discovered evidence makes it "probable that a different result would be obtained if another trial should be had") (citation omitted); *Klopp v. Jill*, 4 Kan. 482, 487-88 (1868) (new trial warranted when the newly discovered evidence "would probably produce a different verdict").

B. The burden of proof for new trial motions based on newly discovered evidence in federal courts

Federal practice mirrors the widespread state practice. Federal courts uniformly apply a preponderance of the evidence burden of proof to criminal defendants' motions seeking a new trial based on newly discovered evidence. *E.g.*, *United States v. Ponzo*, 913 F.3d 162, 164 (1st Cir. 2019) (newly discovered evidence warrants a new trial when it "will probably result in an acquittal upon retrial") (internal quotation marks and citation omitted); *United States v. Wolf*, 860 F.3d 175, 189 (4th Cir. 2017) (same); *United States v. Chapman*, 851 F.3d 363, 381 (5th Cir. 2017) (same); *see generally*, 3 C.A. Wright *et al.*, *Fed. Prac. & P.: Crim.* § 584 (4th ed. Thomson Reuters 2018) (newly discovered evidence warrants a new trial when it "would probably produce an acquittal") (footnote omitted).

Further, federal courts have applied a preponderance burden of proof to new trial motions based on newly discovered evidence since the nineteenth century. *See United States v. Smith*, 27 F. Cas. 1175, 1180 (D. Ore. 1870) ("if the evidence were newly discovered, the court must be satisfied, before granting a new trial, that it is so material that it would probably produce a different verdict") (citation omitted); *Silvey v. United States,* 7 Ct. Cl. 305, 308 (1871); *see generally* Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83 (act of First Congress providing for new trials "for reasons for which new trials have usually been granted in courts of law"). As the court observed in *Silvey*, "[t]he common-law rule is too well known and too certainly fixed to need investigation, being

almost universally enunciated in the same terms by the English, Federal, and State courts," and the party moving for a new trial based on newly discovered evidence must show, among other things, "'[t]hat the evidence . . . is so material that it would probably produce a different verdict if the new trial were granted.'" *Silvey*, 7 Ct. Cl. at 308 (citation omitted).

C. Ohio's clear and convincing burden of proof for criminal defendants seeking new trials based on newly discovered evidence denies a fundamental right and is fundamentally unfair.

"The near-uniform application of a standard [of proof] that is more protective of the defendant's rights than [a] . . . clear and convincing evidence rule supports [the] conclusion that the heightened standard offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people'" as to be ranked as fundamental. *Cooper,* 517 U.S. at 362 (citation omitted). The "widely shared practice" also serves "as [a] concrete indicator[] of what fundamental fairness and rationality require." *Schad*, 501 U.S. at 640.

For example, *Cooper* found that Oklahoma's statutory requirement that criminal defendants prove their competence to stand trial by clear and convincing evidence violated the Due Process Clause where, although four states had the same rule, forty-six states and all federal courts required no more than a preponderance showing. *Cooper*, 517 U.S. at 360-62. Similarly, *Addington*, 441 U.S. 418, found that Texas's common law rule requiring the state to make only a preponderance of the evidence showing in civil

commitment proceedings—a rule shared by one other state—did not pass muster under Due Process Clause and that, instead, Due Process requires a higher, clear and convincing showing. *Id.* at 426, 431-33. So, too, *Santosky*, 455 U.S. at 769, found that a New York statute requiring only a preponderance of evidence to terminate parental rights for neglect violated the Due Process Clause, while the clear and convincing showing required in "[a] majority of States . . . str[uck] a fair balance between the rights of the natural parents and the State's legitimate concerns" *Compare Herrera v. Collins*, 506 U.S. 390, 410-11 (1993) (Texas rule requiring new trial motions based on newly discovered evidence to be filed within 30 days after sentencing did not violate Due Process where the current state court practice was "divergent" with "[o]nly 14 States allow[ing] a new trial motion based on newly discovered evidence to be filed more than three years after conviction"), *and Medina*, 505 U.S. at 447 (imposing burden on defendant to show competence to stand trial did not violate Due Process where there was "no settled view" in contemporary practice).

"Historical practice [also] is probative of whether a procedural rule can be characterized as fundamental." *Medina*, 505 U.S. at 446 (citation omitted). It is another "concrete indicator[] of what fundamental fairness and rationality require." *Schad*, 501 U.S. at 640; *see also Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) ("Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice.") (citation omitted). Thus, *Cooper* concluded that the clear and convincing burden at issue there violated a fundamental right after

surveying early English and U.S. authorities that were "bereft of language susceptible of supporting a clear and convincing evidence standard" for competency determinations. *Cooper*, 517 U.S. at 358-60; *compare Herrera*, 506 U.S. at 408-10 (Texas rule requiring new trial motions based on newly discovered evidence to be filed within 30 days after sentencing did not violate Due Process where there was wide variation in historical practice), *and Medina*, 505 U.S. at 446 (imposing burden on defendant to show competence to stand trial did not violate Due Process where there was "no settled tradition").

Ohio's common law clear and convincing burden for new trial motions based on newly discovered evidence stands alone even more starkly than did the burdens of proof at issue in *Cooper*, *Addington*, and *Santosky*, each of which denied Due Process. Today, Ohio's clear and convincing burden is shared by no other U.S. jurisdiction, state or federal. It also is contrary to the historical U.S. state and federal practice.

Indeed, Ohio's current rule is contrary to Ohio's own historical practice of applying a preponderance standard in the nineteenth century. *Gandolfo v. Ohio*, 11 Ohio St. 114, 119 (1860). It was not until *Lopa*, 117 N.E. at 320 —a case where the burden of proof was not at issue—that the Ohio Supreme Court, with no citation, comment, or analysis, applied the higher standard. Because it conflicts with both the widely shared and historical U.S. practices, Ohio's clear and convincing burden of proof for defendants seeking new trials based on newly discovered evidence denies a fundamental right, is fundamentally unfair, and violates the Due Process Clause.

II. FOR NEW TRIAL MOTIONS BASED ON NEWLY DISCOVERED EVIDENCE, DUE PROCESS REQUIRES APPLYING NO MORE THAN A PREPONDERANCE STANDARD BECAUSE A GREATER BURDEN MISALLOCATES THE RISK OF ERROR.

"[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the . . . interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755. "The 'more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.'" *Cooper*, 517 U.S. at 362 (quoting *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 283 (1990)).

"In the administration of criminal justice, our society imposes almost the entire risk of error upon itself . . . by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." *Addington*, 441 U.S. at 423-24 (citing *In re Winship*, 397 U.S. 358, 370 (1970)). That standard, of course, was applied in Mr. Prade's 1998 trial, defendants like Mr. Prade who have been convicted stand in a different posture than defendants who have yet to be tried, and Ohio has a significant interest in the finality of criminal convictions. *See Herrera*, 506 U.S. at 399-400.

But no system is perfect, including ours. Even applying the rigorous beyond reasonable doubt standard, the U.S. criminal justice system has produced hundreds of convictions known to have been wrongful. (*See* Nat'l Registry of Exonerations

(http://www.law.umich.edu/special/exoneration/Pages/about.aspx) (last visited Aug. 9, 2019) (listing 2,479 exonerations). Not surprisingly given the system's fallibility and the importance of defendants' interests in their very liberty and freedom that are at stake, every U.S. jurisdiction permits new trial motions based on newly discovered evidence. Those motions present defendants with daunting threshold burdens wholly apart from the burden of proof, including often-short time limitations and requirements that the evidence (1) was unavailable at the time of trial, (2) could not reasonably have been discovered at the time of trial, and (3) is material and not merely cumulative. *See*, *e.g.*, *Ponzo*, 913 F.3d at 164. Further, new trial motions based on newly discovered evidence speak directly to the core issue of guilt or innocence in that, by definition, they involve material evidence that may produce an acquittal and that was not considered by the original jury.

The question here is: Once a defendant produces newly discovered evidence that makes it more likely than not that he or she would be acquitted in a new trial, can the state deny a new trial by imposing the much higher clear and convincing burden without violating the Due Process Clause? Significantly, the universe of cases where this would matter—*i.e.*, criminal cases where there is newly discovered evidence that both (1) could not have been discovered at the time of trial and (2) would, in a new trial, make an acquittal more likely than not but does not reach the clear and convincing standard—is substantial yet not unlimited.

Moreover, the preponderance burden of proof fully protects the state's interest in the finality of criminal

convictions. For example, in *Strickland v. Washington*, 466 U.S. 668 (1984), this Court found that, for defendants with new evidence not presented at trial due to constitutionally ineffective assistance of counsel, a preponderance standard was too high and that, instead, a lower, "reasonable probability" burden applies. *Id.* at 694. While this case does not involve a claim of constitutionally ineffective assistance of counsel, *Strickland* nonetheless is instructive here for two reasons. First, the preponderance standard for new trial motions based on newly discovered evidence is so firmly embedded in American jurisprudence that *Strickland* simply assumed without discussion that a preponderance standard applies to them. *Id.* Second, *Strickland* explained why the preponderance standard protects the state's interest in the finality of criminal convictions; namely, a preponderance burden is a "*high standard* . . . [that] presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Id.* (italics added). It "has several strengths," including that it "defines the relevant inquiry in a way familiar to courts" and "reflects the profound importance of finality in criminal proceedings." *Id.* at 693.

On the other side of the balance, the defendant's liberty and freedom are at stake in that, absent a new trial, the defendant will remain imprisoned despite there being new evidence that, by assumption, likely would result in his or her acquittal. Further, the underlying conviction is suspect because, through no fault of the defendant, the original jury that convicted did not have before it the new evidence that makes an acquittal more likely than not.

Every other U.S. jurisdiction has explicitly or implicitly weighed the interests here and concluded that no more than a preponderance showing should be required. *See*, *e.g.*, *Yorke v. Maryland*, 556 A.2d 230, 235 (Md. Ct. App. 1989) (after lengthy analysis, finding the appropriate standard to be that "[t]he newly discovered evidence *may well have* produced a different result, that is, there was a *substantial or significant possibility* that the verdict . . . would have been affected") (italics added). But Ohio, without explanation or analysis, has woodenly applied a clear and convincing standard for over a century. The balance of interests here plainly bars applying the heightened clear and convincing burden of proof because it conflicts with the "societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755. Ohio's elevated burden of proof for new trial motions based on newly discovered evidence violates the Due Process Clause.

III. THIS CASE IS AN IDEAL VEHICLE.

Ohio's elevated burden of proof not only violates the Due Process Clause, it was material to the denial of Mr. Prade's new trial motion. It is undisputed that there was male DNA over the killer's bite mark, but that it was not Mr. Prade's DNA. Both lower courts relied on the rigorous "strong probability" burden of proof in denying Mr. Prade a new trial. Pet. App. 22a (Ninth Dist. Ct. App.); Pet. App. 43a–44a, 50a, 61a–64a (trial court). Indeed, the Ninth District italicized that burden for emphasis when explaining its affirmance of the lower court's rejection of the new DNA evidence. Pet. App. 22a ("Mr. Prade has not shown that there is a *strong probability* the new

results would lead to a different outcome if introduced at a new trial.") (Ninth District's italics).

The killer's bite that was instrumental in Mr. Prade's conviction now is compelling evidence not of guilt, but of innocence. Three trial jurors said on national television that they would not have convicted without the evidence linking Mr. Prade to the bite mark impression on the victim's skin. Pet. App. 141a. Because that evidence since has been shown to be "junk science," a new jury would not hear it; instead, a new jury would hear that there was male DNA over the killer's bite mark that did not belong to Mr. Prade.

The new DNA and bite mark identification evidence here convinced the first, since-retired postconviction trial judge not only that Mr. Prade should have a new trial, but that he is actually innocent. Pet. App. 96a–98a. Editorials in major Ohio newspapers—*The Plain Dealer* in Cleveland and the *Akron Beacon Journal*—called for Mr. Prade to have a new trial,[7] as have the victim's (and Mr. Prade's) children.[8] Indeed, an Ohio Supreme Court Justice had "no doubt that this case needs to go to a new jury," found this case to be "an astounding miscarriage of justice," and stated that Mr. Prade is "entitled to a fair

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[7] *The Plain Dealer* (Aug. 1, 2014) (https://www.cleveland.com/opinion/2014/08/douglas_prade_should_not_go_ba.html) (last visited June 27, 2019); *Akron Beacon Journal* (Aug. 15, 2015) (https://www.ohio.com/article/20150815/OPINION/308159521) (last visited June 27, 2019);

[8] *Akron Beacon Journal* (Jan. 4, 2016) (https://www.ohio.com/article/20160104/NEWS/301049339) (last visited June 27, 2019).

trial . . . [t]hat still has not happened, and it should." *Ohio ex rel. Prade v. Ninth Dist. Ct. App.*, 87 N.E.3d 1239, 1245-46 (Ohio 2017) (O'Neill, J., dissenting).

CONCLUSION

The Court should grant the petition.

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