No. 19-230

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has largely allowed the States to manage the processes by which they will conduct criminal cases, intervening only where the State's procedures make the process fundamentally unfair, such that it offends procedural due process. This is especially true in procedures that take place after an offender has gone to trial, a jury has found him guilty beyond a reasonable doubt, and the court has imposed his sentence.

Douglas Prade wants this Court to believe three fundamentally untrue things: first, that Ohio imposes such an insurmountable burden upon those seeking a new trial based on newly discovered evidence that its procedures are inherently unfair; that Ohio is alone in imposing this burden; and that Prade raised his procedural due process challenge to Ohio's procedures below.

Would it contravene this Court's longstanding recognition of the states' interests in the finality of criminal proceedings to grant Prade a new trial in light of his misrepresentations to this Court?

LIST OF PARTIES

The Petitioner is Douglas Prade, an inmate at the Lorain Correctional Institution in Grafton, Ohio.

The Respondent is the State of Ohio.

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COUNTERSTATEMENT

Douglas Prade misrepresents the law and the facts to ask this Court to answer a question that he did not ask below.

Overconfident in the strength of his new information, Prade merely noted to both courts that they could apply a different standard of proof to his case than the Ohio Supreme Court enunciated in *Gandolfo v. Ohio*, 11 Ohio St. 114 (1860), *Ohio v. Lopa,* 117 N.E. 319 (1917), and *Ohio v. Petro*, 76 N.E.2d 370 (1947).

At the trial court, he did so only in footnotes.

At the Court of Appeals, he devoted a single sentence to the question.

He did not, therefore, actually develop any argument why either court should apply a different standard.

Not once did he ask either court to consider whether Ohio's precedent in *Petro* might offend due process.

The first time Prade made such a claim was when he asked the Ohio Supreme Court to accept jurisdiction over his case. At that point, Prade asked that Court to do what he also asks this Court to do: to change Ohio's standards to fit his case.

Overwhelming Evidence that Prade is Guilty

Douglas Prade was the only person Dr. Margo Prade feared.

During their nearly 18-year marriage, while Dr. Prade was the family's main breadwinner, Prade became physical during the couple's arguments, pushing Dr. Prade's head back with his hands and

pushing her nose into her face. He yelled at her in her mother's presence.

Prade often appeared, dressed in his Akron Police uniform, between 15 minutes and a half hour after Dr. Prade met with her girlfriends to socialize. Soon after he would appear, Dr. Prade would tell her friends she had to leave.

On multiple occasions, one of Dr. Prade's friends testified, the friend asked Dr. Prade to come with the couple's two daughters to stay with her after Dr. Prade's accounts of Prade's behavior during the couple's arguments so alarmed the doctor's friends that they feared for her life and advised her to seek police intervention.

For three years, Dr. Prade vacillated about divorcing Prade, and sent him several drafts of separation agreements. He did not respond to them, but began dating another woman — yet he wiretapped Dr. Prade's telephone, recorded her calls, and videotaped her male friends when Prade saw them in public with her.

Finally, in December 1996, Dr. Prade decided to divorce Prade. During a January 1997 meeting with a terrified Dr. Prade and her divorce lawyer, Prade told the lawyer he had spent thousands of dollars having Dr. Prade followed.

Prade did not participate in the divorce proceedings, and Dr. Prade was granted an uncontested divorce and child support. Prade, however, refused to move out of the marital home and refused to obey the divorce decree's order that he sign a quitclaim deed to the house.

When Prade finally moved out, Dr. Prade had all of the locks changed and installed an alarm system on the house — but Prade still got access to the house, using one of his daughters' keys.

He harassed Dr. Prade at her medical office and at an Akron hospital while she was doing her rounds.

He frequently accessed her office for one to three hours at a time in the middle of the night. He called Dr. Prade's house at least once on every night when she was out, to ask the babysitter where she was and who she was with.

He threatened Dr. Prade's life so many times that another police officer's wife advised her to buy a gun.

In November 1997, Prade told their children he was denouncing them in favor of his girlfriend and her son, upsetting the girls. At that point, Dr. Prade decided to move to terminate her and Prade's joint custody of the girls and to seek an increase in child support.

Meanwhile, Prade earned about half of Dr. Prade's salary, and he also paid child support to another woman who bore him a child while he was married to Dr. Prade. In a six-month period in Fall 1997, he depleted his bank account of more than $9,000.

On the back of a deposit slip from Prade's bank account dated in early October 1997, Prade wrote down the debts he owed, added them up, and subtracted them from a $75,000 amount.

That was the payout amount of Dr. Prade's life insurance policy, for which Prade was still the sole beneficiary.

On November 25, 1997, his account had a negative $500 balance.

Shortly before 9 a.m. on November 26, 1997, Dr. Prade called her medical assistant to say she was returning from her hospital rounds. At 9:05, Dr. Prade called the auto dealership located next door to her office to ask about the status of a new vehicle she had ordered.

Shortly before she called, one of the dealership's employees encountered Prade outside the dealership.

The auto dealership's videotape surveillance system later showed a small car arriving at the parking lot behind Dr. Prade's office around 9:02 a.m. and circling at least once.

At 9:09, the videotape showed Dr. Prade's van park in the office lot. At the same time, the smaller car pulled close and parked. A single figure left the small car, walked to Dr. Prade's van, and entered the van's passenger side.

The only way to get access to the parked van was if Dr. Prade unlocked the door, or if the figure had a key. Prade still had a key.

About three minutes later, the figure left Dr. Prade's van, got back into the small car, and left.

One of Dr. Prade's patients, who was leaving after having blood drawn, heard a car's tires squeal, looked out of the office's back door, and saw Prade quickly drive out of the lot.

Inside her Dodge Grand Caravan, Dr. Prade had been bitten on the underside of her left upper arm. Her keys lay on the driver's side floor, beside her left foot. She had been shot six times with a .38 Special revolver, three times after she had been pulled forward violently enough to tear buttons off of her lab coat.

She bled to death in her van before her medical assistant found her body about an hour later.

Dr. Prade's purse was still in the van. So was her cell phone. She was wearing a large amount of jewelry, but the only piece that was disturbed was a diamond and gold tennis bracelet that was found in the van, broken.

Less than an hour after Dr. Prade's body was found, Prade arrived while police were processing the murder scene. He told officers he had been working out in the gym at his apartment building starting at 9:30 that morning, and that when another officer

paged him about the shooting at Dr. Prade's office, he left the gym and drove directly there — but he appeared to his fellow officers to have freshly showered. Prade would later say that he began his workout closer to 9 a.m.

One of the two people Prade said was at the gym with him that morning could not say for certain when he may have been at the gym. The other said he had never seen Prade before.

Later that day, Dr. Prade's mother and divorce lawyer went to her house with other friends and relatives. As the murdered doctor's mother and lawyer searched for her insurance information, Prade walked in and said that he had just seen the insurance papers there a few days beforehand.

A month later, the insurance company paid Prade $75,238.50.

An FBI serologist technician cut out the 2½-inch wide by 1- to 2-inches deep section of Dr. Prade's bloodsoaked lab coat bearing the bite mark. A DNA examiner cut three ¼-inch square cuttings from the bite mark, one from the left side of the mark, one from the center, and one from the right side. Due to the overwhelming amount of Dr. Prade's DNA present in the cuttings, polymerase chain reaction testing (or "PCR testing") only found DNA consistent with Dr. Prade's profile. Prade's profile was not found at that time.

Subsequently, the bite mark section was sent to the Serological Research Institute or SERI for further testing. A preliminary test of the entire bite mark for amylase, a component of saliva, showed the probable presence of amylase, but dispositive confirmative testing of three additional cuttings of the bite mark indicated that no amylase – no saliva – existed. SERI also conducted PCR testing on its

cuttings and confirmed the FBI's findings that only Dr. Prade's DNA was present on the bite mark.

The DNA experts were among 53 witnesses (including Prade) who testified over five weeks during Prade's 1998 trial on charges of aggravated murder, possessing criminal tools, and wiretapping.

Also among the witnesses were three dental experts. One testified that the bite mark was consistent with Prade's dentition; another testified that Prade was the biter; and the defense expert testified that Prade's poorly fitted upper denture made him unable to bite anything forcefully.

The jury convicted Prade on all counts, and the trial court imposed a life sentence. Prade unsuccessfully appealed. See *Ohio v. Prade (Prade I)*, 745 N.E.2d 475 (Ohio Ct.App. 2000), appeal not allowed, 739 N.E.2d 816 (Ohio 2000). The appellate court concluded that Dr. Prade was killed by someone motivated only to kill her, and that Prade had that motive to kill her due to his financial problems.

In 2004 and again in 2008, Prade applied for new DNA testing under Ohio Rev. Code §2953.74, specifically to have Y chromosome short tandem repeat ("Y-STR") testing. He appealed the trial court's denial of his second application. The court of appeals also rejected Prade's argument, but the Ohio Supreme Court eventually reversed that decision and remanded the case to the trial court. See *Ohio v. Prade (Prade II),* No. 24296, 2009 WL 388217 (Ohio Ct.App. Feb. 18, 2009); *Ohio v. Prade (Prade III)*, 930 N.E.2d 287 (Ohio 2010).

The trial court granted Prade's application for additional DNA testing. DNA Diagnostics Center ("DDC") used the Y-STR method to compare reference standards from Prade and Dr. Prade to extracts from swabbings of the three cuttings the FBI made in 1998, and to two additional extracts of swabbings

of the bite mark, but whether these were swabbings from Dr. Prade's lab coat or from her skin at autopsy was unknown. DDC could not find enough DNA on these samples to perform Y-STR testing on any of them.

DDC then took four new cuttings from the bite mark section of Dr. Prade's lab coat. One cutting encompassed the area where the FBI had taken two of its cuttings; this sample uncovered a single partial male profile that did not match Prade. Three additional cuttings, added to an extract from the first cutting, uncovered at least two partial male profiles that did not match Prade, but also did not match the profile from the first cutting.

Ohio's Bureau of Criminal Identification and Investigation ("BCI") also tested a cutting taken directly beside DDC's, and uncovered partial male profiles. These profiles were insufficient for comparison.

After a hearing, the trial court (presided over by a jurist who had not heard Prade's trial) eventually granted Prade postconviction relief and, alternatively, his motion for a new trial. *Ohio v. Prade*, CR 1998-02-0463 (Summit Cty. Common Pleas Jan. 29, 2013) (2013 Order). The court found that Prade's acts such as physically assaulting Dr. Prade, threatening her life, and tapping and recording her telephone conversations constituted "friction, turmoil, and name calling [that were] not uncommon during divorce proceedings." Id. at 17.

At that time, Prade had not argued that Ohio's burden of proof for new trials offends due process, but relied upon the five-element test and burden of proof enunciated in *Ohio v. Petro*, 76 N.E.2d 370 (Ohio 1947). Under that test, a defendant must show that new evidence:

> 1) Discloses a strong probability that it will change the result of a new trial;

> 2) Was discovered since the original trial;
>
> 3) Was such that the defendant or his counsel could not "in the exercise of due diligence" have discovered the evidence before the trial;
>
> 4) Was material to the issues;
>
> 5) Was not merely cumulative to former evidence; and
>
> 6) Does not merely impeach or contradict the former evidence.

Petro, 76 N.E.2d 370, syllabus.

Rather than argue whether the *Petro* test was unconstitutional, Prade briefed the meaning of "strong probability."

The Court of Appeals reversed and remanded, concluding that the lack of saliva on the bite mark, coupled with the presence of weak male DNA profiles that did not match from sample to sample, left the Court unable to conclude with any certainty that any of the DNA from the bite mark sample belonged to Dr. Prade's killer. *Ohio v. Prade (Prade IV)*, 9 N.E.3d 1072, 1104 (Ohio Ct.App. 2014); appeal not allowed, 12 N.E.2d 1229 (Ohio 2014).

As for the bite mark left on Dr. Prade's skin, the Court of Appeals held that because the jury "was essentially presented with the entire spectrum of opinions on the bite mark at trial," Prade's additional criticism of that evidence was merely cumulative. *Prade IV*, 9 N.E.3d at 1106.

Further, the Court of Appeals stated:

> The amount of circumstantial evidence that the State presented at trial in support of Prade's guilt was overwhelming. The picture painted by that evidence was one of an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the

> house, found happiness with another man, and threatened his dwindling finances.

Prade IV, 9 N.E.3d at 1104.

Concluding that the trial court abused its discretion in granting Prade postconviction relief and/or a new trial, the Court of Appeals noted:

> Friction, turmoil, and name calling, *** are distinctly different than stalking, wiretapping, arguments with physical components, and death threats. *** Moreover, that evidence stood separate and apart from the expert testimony introduced at trial. It is wholly unclear to this Court that "bite mark evidence *** provided the basis for the guilty verdict" on the aggravated murder count. The State presented an enormous amount of evidence in this case, and this Court cannot say that any one piece of evidence resulted in the guilty verdict. Rather, it stands to reason that all of the evidence, viewed as a whole, provided the basis for the guilty verdict.

Prade IV, 9 N.E.3d at 1106.

On remand, Prade for the first time noted that a different burden of proof might apply to motions for a new trial — but he did so as a passing reference in a footnote to his citation to *Petro* in a supplemental brief, while at the same time noting that "the new evidence presented here easily satisfies the 'strong probability' standard set forth in the Supreme Court of Ohio's 68-year-old decision in *Petro*." Supplemental Memorandum in Support of Petition for Postconviction Relief at 3, *State v. Prade*, CR 1998-02-0463 (filed June 5, 2015).

Prade did not argue that the *Petro* standard offended due process.

In the same document, Prade also argued that the trial court should admit and consider "Dateline

NBC" interviews with some of Prade's jurors concerning the effect of bite mark evidence on those jurors' minds and concerning its effect on those jurors' mental processes during deliberations. See id. at 11, 32.

In a post-hearing brief, Prade repeated his statement that a different burden of proof might apply to motions for a new trial. See Defendant Douglas Prade's Post-Hearing Brief on DNA Evidence at 5, *State v. Prade*, CR 1998-02-0463 (filed Dec. 7, 2015). The statement, which appears to have been cut from Prade's previous Supplemental Memorandum and pasted into his post-hearing brief, also appeared as a footnote to a citation to *Petro* and did not argue that Ohio's standard might offend due process.

The trial court, again presided over by a different judge, reinstated Prade's conviction and sentence.

Prade applied to the Ohio Supreme Court for a writ of prohibition to void the Court of Appeals' judgment and the trial court's subsequent orders. See *Ohio ex rel. Prade v. Ninth District Court of Appeals (Prade V),* 87 N.E.3d 1239 (Ohio 2017).

The Ohio Supreme Court denied Prade the writ, holding that since Ohio's postconviction relief statutes unambiguously allow the State an absolute right to appeal a judgment granting postconviction relief, the Court of Appeals possessed jurisdiction to hear the State's appeal and the trial court possessed jurisdiction to carry the Court of Appeals' judgment into effect. See *Prade V*, 87 N.E.3d at 1245.

The language Prade cites from that decision in his Petition to this Court comes from the sole dissenting Justice, who is no longer on that Court's bench. See *Prade V,* 87 N.E.3d at 1245-1246 (O'Neill, J., dissenting).

At the same time, Prade appealed the trial court's order to the Court of Appeals. Before that Court,

Prade addressed his burden of proof in a single sentence, thusly: "Although Captain Prade has met the 'strong probability' standard, 'reasonable probability' is the correct standard. See *State v. Siller*, 8th Dist. No. 90856, 2009-Ohio-2874, ¶45." Brief of Appellant at 19, *State v. Prade (Prade VI)*, 107 N.E.3d 1268 (Ohio Ct.App. 2018). Prade did not argue that the "reasonable probability" standard might offend due process.

The Court of Appeals affirmed, finding after an extensive review of the postconviction evidence that the trial court did not abuse its discretion by:

- questioning the materiality of the DNA evidence;
- finding that criticism of the bite mark evidence was not "new evidence" that Prade could have discovered with due diligence prior to trial and that it was merely cumulative and/or impeaching of the evidence the jury already heard; or
- finding that neither category of evidence raised a strong probability of a different verdict in light of the overwhelming circumstantial evidence against Prade.

See *Prade VI*, 107 N.E.3d at 1280-1286.

Prade did not challenge the *Petro* standard's constitutionality until he applied to the Ohio Supreme Court for discretionary review of *Prade VI*. See Memorandum in Support of Jurisdiction passim, *Ohio v. Prade*, No. 2019-0019. That Court declined review without opinion. See *Ohio v. Prade*, 119 N.E.3d 434 (Ohio 2019).

REASONS FOR DENYING THE WRIT

I. Prade's Case Is Not an Ideal Vehicle

A. Prade Did Not Develop This Argument Below

Prade attempts to evade his waiver by claiming that Ohio's courts were incapable of considering his argument.

That is not true. Even in Ohio, any challenge to the constitutionality of a statute or a rule of procedure must generally be raised in the trial court, or it will be forfeited on review. See, e.g., *Ohio v. Awan*, 489 N.E.2d 277, 280 (Ohio 1986); *Ohio v. Quarterman*, 19 N.E.3d 900, 904-905 (Ohio 2014); *Ohio v. Davis*, 880 N.E.2d 31, 83 (Ohio 2008). In addition, it is not unethical for an attorney to advance claims in good faith that attempt to extend, modify, or reverse existing law. See *Toledo Bar Ass'n v. Rust*, 921 N.E.2d 1056, 1057 (Ohio 2010).

Prade also misconstrues the import of the Ohio Supreme Court's action in his case. That Court did not rule against him; instead, it merely denied him discretionary review. A state court's denial of discretionary review "expresses no view as to the merits," and when that occurs, "no state court has addressed [the petitioner's] claim." *Yee v. City of Escondido,* 503 U.S. 519, 533 (1992).

This Court routinely declines to consider arguments that the parties did not press below. See, e.g., *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 332, n.2 (2008); *Yee*, 503 U.S. at 533; *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n4 (2008).

Since Prade did not press his argument below, this Court should devote its limited resources elsewhere, and deny certiorari to Prade.

B. Prade Misrepresents Ohio Law

Ohio does not impose a clear and convincing standard of proof on motions for new trial based on newly discovered evidence.

Prade mirepresents the case law to claim that Ohio's courts "equate the 'strong probability' burden of proof with 'one of clear and convincing evidence.'" See Petition at 3. His mischaracterization derives from inapplicable decisions by Ohio's intermediate appellate courts concerning issues other than motions for new trial brought under Ohio R.Crim.P. 33.

Some of the cases Prade cites equate "strong probability" with a clear and convincing standard of proof in the context of a determination of whether further DNA testing under one of Ohio's other post-conviction relief statutes would be "outcome determinative." See Ohio Rev.Code §2953.71(L); *Ohio v. Ayers*, 923 N.E.2d 654, 658-659 (Ohio Ct.App. 2009) ("The addition of the words 'strong probability,' among others, in the current version of R.C. 2953.71(L), in essence lowers the definition of 'outcome determinative' from a showing of innocence beyond a reasonable doubt to one of clear and convincing evidence."); *Ohio v. King*, 2012-Ohio-4398 (Ohio Ct.App. 2012) (exclusion of defendant as DNA contributor of semen or fingernail scrapings deposited up to a week before victim's murder did not merit postconviction relief under Ohio Rev.Code §2953.21(A)(1)(b)).

The distinction between these procedures cannot be overstated. In Ohio, a successful motion for new trial will result in just a new trial, whereas a successful postconviction relief petition can vacate the offender's conviction altogether.

Maine, on the other hand, actually requires a defendant seeking a new trial to demonstrate each part of that state's test by clear and convincing evidence.

See *Maine v. Twardus*, 72 A.3d 523, 531 (Maine 2013). So, even if Prade had accurately characterized Ohio law, Ohio would not be the outlier that Prade would like this Court to believe.

The only time Ohio places a clear and convincing standard on defendants seeking a new trial is where they seek to file an *untimely* motion for new trial based on newly discovered evidence; then, Ohio requires them to show by clear and convincing evidence in a motion for leave to file for new trial that they could not have filed the new-trial motion before Ohio's deadline expired — as is correctly stated in a case Prade cited, *Ohio v. Anderson*, 2014-Ohio-1849 (Ohio Ct.App. 2014). That case, however, does not impose a clear and convincing standard on all elements of a new trial motion, as Prade claims.

Then, the passage to which Prade cites in *Ohio v. Vinzant*, 2008-Ohio-4399 (Ohio Ct.App. 2008) does not announce the court of appeals' standard, but merely quotes from the challenged decision below. The *Vinzant* Court actually applied a "reasonable probability" standard in that case. See *Vinzant*, 2008-Ohio-4399, ¶14.

Finally, Prade misrepresents *Siller*, 2009-Ohio-2874, which he claims contains the standard this Court should enshrine. Under Prade's preferred test, newly-discovered evidence will be considered sufficiently material to warrant a new trial when there is a reasonable probability that, had the defense possessed the evidence prior to trial, the result of the proceeding would have been different — and that a "reasonable probability" should be defined as a probability sufficient to undermine confidence in the outcome. See *Siller*, 2009-Ohio-2874, ¶47.

If that sounds familiar, it should; it is a slightly amended version of the test this Court announced in *United States v. Bagley*, 437 U.S. 667, 682 (1984) to

determine when the discovery of exculpatory information withheld by the state in violation of *Brady v. Maryland*, 373 U.S. 83 (1963) will merit a new trial.

Ohio applies that standard to requests for new trial where the State has suppressed exculpatory evidence, or, as in *Siller*, where an agent of the State has fabricated or falsified exculpatory evidence. See *Ohio v. Johnson*, 529 N.E.2d 898 (Ohio 1988); *Siller*, 2009-Ohio-2874, ¶¶46-48; *Ohio v. Johnson*, 2010-Ohio-4117 (Ohio Ct.App. 2010), ¶23, n.3 (explaining *Siller* applied to *Brady* violations). It is consistent with holdings in Federal courts, such as in *United States v. Redcorn*, 528 F.3d 727, 743-744 (10th Cir.2008).

Prade also misrepresents Ohio's past cases, which have endorsed at least a "strong probability" standard since the Civil War. In *Gandolfo v. Ohio*, 11 Ohio St. 114 (1860), Ohio adopted the following rule from an early treatise on new trials and from a Vermont case as follows:

> The rule, it has been said, has an occasional exception, where, by admitting the evidence, "what was before mysterious and doubtful, becomes plain and certain, so that if received the most obvious justice, and if rejected the most palpable injustice will be done." 3 Graham & Waterman on New Trials, 1064; *Barker v. French*, 18 Vermont, 360.

Gandolfo, 11 Ohio St. at 119.

Thus, the Ohio Supreme Court had not only precedent from its own State, but also from an earlytreatise and a case from another State upon which to base its "strong probability" language in *Ohio v. Lopa*, 117 N.E. 319 (1917).

So again, Prade's case is not an ideal vehicle in which to present his argument to this Court.

C. Prade Mischaracterizes the Record

Prade overplays the importance of the bite mark evidence, which accounted for only about 200 of the approximately 2,200 pages of transcripts of the evidence in Prade's trial. Furthermore, Prade attempts to make much of television interviews with three of Prade's jurors, which are inadmissible aliunde evidence under both Ohio's and the Federal courts' Rule of Evidence 606.

Prade also mischaracterizes the other evidence the State presented against him in trial. There, he represents to this Court, "much of the State's case focused on the Prades' difficult relationship before and after their recent divorce." See Petition at 5.

Characterizing the Prades' relationship as "difficult" insults this Court's intelligence. As the Court of Appeals put it, "overwhelming" evidence painted the Prades' relationship as "one of an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances," and the Court noted that "Friction, turmoil, and name calling, *** are distinctly different than stalking, wiretapping, arguments with physical components, and death threats."

Finally, Prade mischaracterizes the Court of Appeals' most recent holding in his case. That Court did not base its decision solely upon the question of whether Prade's evidence disclosed a strong probability that it would change the result of a new trial; instead, the Court also found that Prade failed to meet other elements of the *Petro* test. Particularly, the Court found Prade did not demonstrate that criticism of bite mark evidence could not have been discovered with due diligence on his part before trial

or that it was not merely cumulative and/or impeaching, and he failed to demonstrate that the DNA evidence showing three different profiles within the bite mark was material.

So again, Prade's case is not an ideal vehicle in which to present his argument to this Court.

II. Ohio Does Not Offend Due Process

Even if Ohio did require that defendants meet a clear and convincing evidence standard, Prade has not demonstrated that it might offend due process.

States are not required to provide procedures for post-sentencing appeals and motions, but when they do, their procedures must not offend due process. See *Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

This Court has nevertheless been reluctant to micromanage the states' rules of criminal procedure, because preventing and dealing with crime is a task more appropriately left to the states. See *Patterson v. New York*, 432 U.S. 197, 201-202 (1977); *Cooper v. Okla.,* 517 U.S. 348, 367 (1996); *Schad v. Arizona*, 501 U.S. 624, 755 (1991).

In the field of criminal law, this Court has narrowly defined the category of acts that will offend due process. See *Medina v. California*, 505 U.S. 437, 443 (1992). "Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." *Patterson*, 432 U.S. at 201.

Many of those basic procedural safeguards have affected pretrial, rather than post-trial, procedure, and include: prohibitions against presumptions of guilt, see *Patterson*, 432 U.S. at 210; prohibitions against vague laws, see *Schad*, 501 U.S. at 632-633; and the ability of a defendant to establish incompetence to stand trial by a preponderance of the evidence, see *Cooper*, 517 U.S. at 368.

In contrast, since postconviction relief "is even further removed from the criminal trial than is discretionary direct review[, and] is not part of the criminal proceeding itself, and []is in fact considered to be civil in nature," this Court has held that the Due Process Clause does not apply to postconviction petitions and motions with the same strength. See, e.g., *Penn. v. Finley*, 481 U.S. 551, 556-557 (1987) (no requirement of state-appointed counsel for postconviction petitions or of full panoply of procedural protections afforded during direct appeal).

To determine if a state's procedures offend due process, this Court has identified two tests, from *Mathews v. Eldridge*, 424 U.S. 319 (1976), and from *Medina*, 505 U.S. 437.

Even if Ohio actually required what Prade claims it does, Prade would still fail either test.

A. *Mathews*

Mathews applies a three-factor test that requires a court to consider: 1) the private interest that would be affected by official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedures; and 3) the government's interest. See *Mathews*, 424 U.S. at 335.

This Court generally limited *Mathews* to civil matters, but has applied it to require a state to refund the costs, fees, and restitution paid by a defendant whose conviction has since been reversed; to set a clear and convincing evidence burden of proof in proceedings to terminate parental rights; and to set a preponderance burden of proof in competency determinations. See *Medina,* 505 U.S. at 444-446 (limiting *Mathews* to civil matters); *Nelson v. Colo.,* 137 S.Ct. 1249 (2017) (money retained after conviction overturned on appeal); *Cooper*, 517 U.S. at 355

et seq. (competency); *Santosky v Kramer*, 455 U.S. 745 (1982) (termination of parental rights).

In balancing the individual's and the government's interests and risks, this Court has noted that the extent to which an individual must be afforded procedural due process is influenced by the extent of his potential loss; the burden of proof the government must bear before subjecting him to that loss is influenced accordingly. See *Cooper*, 517 U.S. at 362, citing *In re Winship*, 397 U.S. 358, 370 (1970); *Santosky*, 455 U.S. at 758.

The clear and convincing evidence standard of proof is appropriate "when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky*, 455 U.S. at 756, quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979). This level of certainty is needed "to preserve fundamental fairness in a variety of government-initiated proceedings that threatens the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Santosky*, 455 U.S. at 756.

Where society is minimally concerned with the outcome and concludes, by weighing the state's interests against the defendant's, that the litigants should share the risk of error in roughly equal fashion, however, the preponderance of the evidence standard is appropriate. *Santosky*, 455 U.S. at 755.

Under *Santosky*, this Court determined that the government must meet a clear and convincing evidence burden before it may permanently strip people of their parental rights; the parents' private interest was "commanding," the risk of error from using a lower standard was "substantial," and the countervailing government interest favoring a lesser standard was "comparatively slight." *Santosky*, 455 U.S. at 758.

The converse must then be true: in cases of individual-initiated proceedings where the individual's risk of an adverse change in his circumstances is small, the risk of error to the government from using a preponderance standard is substantial, and the countervailing governmental interest favoring a greater-than-preponderance standard is more substantial than a mere loss of money, a clear and convincing evidence standard complies with procedural due process.

That is the case here. Prade equates his individual interest with the liberty and freedom interests of defendants who have not yet stood trial, barely mentions Ohio's significant interest in the finality of criminal convictions, and asserts that he has a fundamental right to be freed under a lesser burden of proof than that which he was confident he could meet until he did not. See Petition at 25-26.

Ohio's interest is not as trifling as Prade claims. "Finality has special importance in the context of a federal attack on a state conviction." *McCleskey v. Zant,* 499 U.S. 467, 491 (1991). "Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." *McCleskey*, 499 U.S. at 492. "In fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent very unusual circumstances, the trial will be the one and only opportunity to present their case." *Mich. v. Johnson*, 918 N.W.2d 676, 697 (Mich.2018).

Also, as Justice O'Connor wrote in her concurring opinion in *Herrera*, the root issue is "whether a fairly convicted and therefore legally guilty person is constitutionally entitled to yet another judicial proceeding in which to adjudicate his guilt anew, [more than 20] years after conviction, notwithstand-

ing his failure to demonstrate that constitutional error infected his trial. In most circumstances, that question would answer itself in the negative." *Herrera*, 506 U.S. at 420, O'Connor, J., concurring.

Prade also relies on *Strickland v. Washington*, 466 U.S. 668 (1984) to claim that this Court has enshrined a less-than-preponderance standard for new trial motions based on newly discovered evidence, and to advocate for such a standard in his case.

Strickland did not set the standard for new trial motions. Rather, *Strickland* decided that a defendant who could show that his attorney's performance was deficient and who could further show that there was a "reasonable probability" that but for his attorney's deficient performance, his case would have had a different result, had demonstrated that his trial was fundamentally unfair, and could receive a new trial. See *Strickland*, 466 U.S. at 694.

Also, *Strickland* approved the widely-used outcome-determinative standard for new trial motions; it reflectes the "profound importance of finality in criminal proceedings[,]" because it presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the defendant's trial. *Strickland*, 466 U.S. at 693-694. A trial in which counsel was ineffective, however, cannot be presumptively accurate or fair, and so a lesser standard was appropriate. See *Strickland*, 466 U.S. at 694.

Ohio applies *Strickland* both in direct appeals, and in postconviction proceedings. See *Ohio v. Johnson*, 858 N.E.2d 1144 (Ohio 2006), and *Ohio v. Bradley*, 538 N.E.2d 373 (Ohio 1989) (direct appeal); *Ohio v. Gondor,* 860 N.E.3d 77 (Ohio 2006) (postconviction cases).

Ohio also applies a less-than-clear-and-convincing standard to new trial motions where the defendant has shown that the State deprived the defendant a

fair trial altogether by suppressing exculpatory information, or where an agent of the State fabricated or falsified exculpatory evidence. See *Ohio v. Johnson*, 529 N.E.2d 898 (Ohio 1988); *Siller*, 2009-Ohio-2874, ¶¶46-48; *Ohio v. Johnson*, 2010-Ohio-4117 (Ohio Ct.App. 2010), ¶23, n.3 (explaining *Siller* applies to *Brady* violations).

In fact, Ohio and many other jurisdictions apply different standards of proof to motions for a new trial based upon the category of newly discovered evidence on which they rely. For example, Ohio and other jurisdictions look even less favorably on new trial motions where the newly discovered evidence comes in the form of a witness' recantation. See, e.g. *McKenzie v. Minnesota*, 872 N.W.2d 865, 875 (Minn.2015); *Ramsey v. North Dakota*, 833 N.W.2d 478, 842 (N.D.2013); *Farrar v. Colorado*, 208 P.3d 702, 708 (Colo.2009).

On the other hand, when the government knowingly uses false testimony to convict a person (a violation of *Napue v. Illinois*, 360 U.S. 264 (1959)) the court does not even calculate the probability of a different result in a new trial, thus eliminating an element altogether. See *United States v. Dickerson*, 909 F.3d 118, 125 (5th Cir.2018). Some courts also apply a lesser standard where a witness lied on the stand. See, e.g., *United States v. Wright*, 625 F.3d 1017, 1020 (1st Cir.1980).

Prade has not shown how his interest in having the chance to adjudicate his guilt anew outweighs the profound importance of finality in criminal proceedings, or Ohio's interest in that finality. He has not met the *Mathews* test.

B. *Medina*

Prade also cannot meet the *Medina* test.

Medina held that the test this Court announced in *Patterson* is appropriate for criminal cases, be-

cause the States "have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition." *Medina*, 505 U.S. at 445-446. Therefore, this Court has generally exercised substantial deference to the States in this area, and have invalidated criminal procedures only where they offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Herrera v. Collins*, 506 U.S. 390, 407-408 (1993), quoting *Patterson*, 432 U.S. at 202.

Ohio is not required to show that Prade's proposed right is not fundamental; rather, it is Prade who must demonstrate to this Court that "the principle of procedure *violated* by the rule (and allegedly required by due process) is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Montana v. Englehoff*, 518 U.S. 37, 47 (1996), quoting Patterson, 432 U.S. at 202.

To determine whether a practice is so rooted in the traditions and conscience of the nation as to rank as fundamental, this Court looks to both current and historical practice—but neither is dispositive. See *Herrera*, 506 U.S. at 408, 410; *Medina*, 505 U.S. at 446, 447. The question "is not answered by cataloging the practices of other States." *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (due process not offended by imposing burden of proof on defendant to prove affirmative defense of self defense).

In *Herrera,* this Court noted that the traditional practice was to place a firm deadline on motions for new trial, even when they were based on newly discovered evidence, and thus found that Texas' practice of barring such motions altogether after 30 days after sentencing did not offend due process. See *Herrera,* 506 U.S. at 411. Only 15 States allowed

new trial motions based on newly discovered evidecene to be filed more than three years after a conviction. See *id.* Ohio is one of those states.

1. Few Consistencies in the Law of New Trial Motions

The law highly disfavors motions for new trial based on newly discovered evidence, and directs courts to use great caution before granting them. See, e.g., *Herrera*, 506 U.S. at 417; *Immigration and Naturalization Serv. v. Abudu*, 485 U.S. 94, 107 (1988); *Dickerson*, 909 F.3d at 125; *United States v. Shumaker*, 866 F.3d 956, 961 (9th Cir.2017); *Redcorn*, 528 F.3d at 743; *United States v. Jernigan*, 341 F.3d 1273, 1287 (11th Cir.2003); *Arizona v. Soto-Fong*, 928 P.2d 610, 619 (Ariz.1996); *Idaho v. Capone*, 426 P.3d 469, 479 (Idaho 2018); *More v. Iowa*, 880 N.W.2d 487, 499 (Iowa 2016); Twardus, 72 A.3d at 531; *Michigan v. John*son, 918 N.W.2d 676, 697 (Mich.2018).

Courts do not consider newly discovered evidence in a vacuum, but evaluate it in the context of the rest of the evidence introduced at trial to assess its likelihood of producing a different outcome. See, e.g., *Capone*, 426 P.3d at 479.

Even in the absence of a *Brady* violation, a *Napue* violation, or a recanting witness, the states' approaches to ordinary motions for new trial are not as monolithically consistent as Prade portrays. As Colorado notes, "Although disfavored, new trials are allowed in virtually every jurisdiction in this country, *according to each jurisdiction's own understanding of how and where to strike that balance* [between the need for finality and the state's interest in ensuring the fairness and accuracy of its proceedings, as a matter of public policy]." *Farrar v. Colorado,* 208 P.3d 702, (Colo. 2009), emphasis added.twar

While many states, including Ohio, require a defendant to show variations of four or five similar elements, Indiana requires the defendant to demonstrate nine. See *Denney v. Indiana*, 695 N.E.2d 90, 93 (Indiana 1998).

Ohio permits defendants who discover new evidence to seek leave from the trial court to file a motion for new trial, even decades after Ohio's deadline; other states, such as Texas, do not, thereby permanently foreclosing untimely motions. See *Herrera*, 506 U.S. at 400.

The states are also not consistent in how they quantify "probably."

Iowa characterizes it as a "high standard" "because of the interest in bringing finality to criminal litigation." *More*, 880 N.W.2d at 499, 510. So does South Dakota, which also notes that new trial applications based on new evidence have long been viewed in that state with "distrust and disfavor." See *South Dakota v. Gehm*, 600 N.W.2d 535, 540 (S.D.1999).

Kentucky holds that "to warrant the setting aside of a verdict and granting a new trial, newly discovered evidence 'must be of such decisive value or force that it would with reasonable certainty, change the verdict or that it would probably change the result if a new trial should be granted.'" *Foley v. Kentucky*, 425 S.W.3d 880, 888 (Ky.2014) (new expert's opinion that bullet trajectories showed victims fired weapons, supporting defendant's self defense claim, did not satisfy new trial standard).

Maine states that a defendant's burden is a "heavy one," and notes, "It is not enough for the defendant to show that there is a possibility or a chance of a different verdict. [I]t must be made to appear that, in light of the overall testimony, new and old, another jury *ought* to give a different verdict; there must be a *probability* that a new trial

would result in a different verdict." *Twardus*, 72 A.3d at 532, court's emphasis, citation omitted.

North Dakota, while noting that it follows a "would likely result in an acquittal" standard, also notes that to merit a new trial, newly discovered evidence must be such that the trial court will be "satisfied that in all probability a new trial would result in a different verdict." *Ramsey v. North Dakota*, 833 N.W.2d 478, 842 (N.D.2013).

Kansas requires that the new evidence "be sufficiently credible, substantial, and material to raise in the court's mind, in light of all the evidence introduced at the original trial, a reasonable probability of a different outcome upon retrial." *Kansas v. Thomas*, 891 P.2d 417, 421 (Kan.1995). Indiana holds that "In order for newly discovered evidence to warrant a new trial, it must raise a strong presumption that, in all probability, it would produce a different result upon a new trial." *Denney*, 695 N.E.2d at 93.

In Florida, newly discovered evidence will probably produce an acquittal on retrial if it so weakens the case against the defendant that it gives rise to a reasonable doubt as to his guilt. See *Sweet v. Florida*, 248 So.3d 1060, 1068 (Fla. 2018). Louisiana's test is "whether [the] new evidence is so material that it ought to produce a different result than the verdict reached[,] not simply whether another jury might bring in a different verdict." *Louisiana v. Humphrey*, 445 So.2d. 1155, 1162 (La. 1984).

Massachusetts and Maryland require a substantial and/or significant probability of an acquittal. See *Massachusetts v. Moore*, 109 N.E.3d 484, 504 (Mass. 2018); *Yorke v. Maryland*, 556 A.2d 230, 235 (Md.Ct.App. 1989).

None of these articulates a preponderance test.

In a few states, including Rhode Island and Wisconsin, the trial court does not calculate the probabil-

ity of a defendant's success on retrial until the defendant has met all of the other parts of that state's test. See *Rhode Island v. Drew*, 79 A3d 32 (R.I. 2013); *Wisconsin v. McCallum*, 561 N.W.2d 707 (Wisc. 1997). In Wisconsin, the defendant bears the burden of proving all of the other elements by clear and convincing evidence. See *McCallum,* 561 N.W.2d at 701. If he does that, then the court must decide whether, after looking at both the old and new evidence, there would be a reasonable doubt as to the defendant's guilt. See *Wisconsin v. McAlister*, 911 N.W.2d 77, 86 (Wisc. 2018).

"All in all," noted Maryland's Supreme Court, "we are constrained to conclude that the courts generally play by ear with an ad hoc approach whether the newly discovered evidence calls for a new trial, no matter what words they use to describe the standard alleged to support the decision." *Yorke,* 556 A.2d at 234.

2. No Consistency in Historical Practice

Here, too, the States did not consistently quantify the "probability" of an acquittal necessary for a new trial.

As noted previously, Ohio in 1860 looked to a treatise concerning new trials and a Vermont case to set its "strong probablity" standard in *Gandolfo v. Ohio*, 11 Ohio St. 114 (1860). At least until 1900, Vermont continued to hold that newly discovered evidence could merit a new trial only "where the court have a strong and fixed belief that injustice has been done by the verdict, and a conviction that the new evidence would have turned the verdict the other way, to induce them to open the case for new and fresh litigation," *Bullock v. Beach & Cloys*, 3 Vt. 73 (1830), or the new evidence raised a reasonable doubt as to the defendant's guilt. See *Vermont v.*

Doherty, 48 A. 658 (1900); see also *Barker v. French*, 18 Vermont, 360.

Mississippi also required that newly discovered evidence demonstrate that an injustice has been done. See *Cooper v. Mississippi*, 53 Miss. 393, 398 (Miss. 1876). Virginia required that the evidence "ought to produce, on another trial, an opposite result on the merits." *Barsa v. Kator,* 93 S.E. 613, 615 (Va.1917).

Therefore, Prade has not shown that historical practices give rise to an inference that the standard he seeks is so rooted in the conscience of our people as to be fundamental.

3. Fundamental Fairness in Operation

After considering the historical and current practices, this Court considers whether the rule transgresses any recognized principle of fundamental fairness in its operation. See *Medina*, 505 U.S. at 448. Prade has not shown that Ohio's standard is fundamentally unfair; he only claims it operated unfairly in *his* case.

Ohio does grant motions for new trials based on newly discovered evidence. See, e.g., *Ohio ex rel. Steffen v. Court of Appeals*, 934 N.E.2d 906 (2010) (denying State appeal as of right of decision to grant new mitigation hearing in death penalty case); *Ohio v. Collier*, 2016-Ohio-4951 (Ohio Ct.App. 2016) (rejecting State's appeal of grant of new trial); *Ohio v. Glover*, 64 N.E.3d 442 (Ohio Ct.App. 2016) (same); *State v. Holzapfel*, 2010-Ohio-2856 (Ohio Ct.App. 2010) (same).

Therefore, Ohio's practice cannot be said to be unfair in its operation.

CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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