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

PETITIONER'S REPLY IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

Faced with a century's worth of Ohio authorities applying a "strong probability" burden of proof to new trial motions based on newly discovered evidence, the State's opposition first denies that this is a clear and convincing burden of proof and then asserts that, if it is, the current and historical practices elsewhere are not so different. Neither claim has merit, nor does the State's effort to reconcile Ohio's onerous common-law rule with this Court's Due Process jurisprudence.

Separately, and although Mr. Prade objected to the burden of proof at every opportunity, the State asserts that the issue here was not fairly presented to the courts below, but it was. Finally, the State asserts that the newly discovered evidence here could not result in an acquittal in a new trial. Yet the State grossly exaggerates the strength of its case as reflected by, among other things, the fact that two judges already concluded that the newly discovered evidence here at a minimum requires a new trial.

Ohio's clear and convincing burden of proof violates the Due Process Clause. The Court should grant the petition.

ARGUMENT

I. OHIO APPLIES A CLEAR AND CONVINCING BURDEN OF PROOF TO NEW TRIAL MOTIONS BASED ON NEWLY DISCOVERED EVIDENCE.

The State asserts that Ohio courts do not equate the strong probability and clear and convincing burdens in the context of new trial motions based on newly discovered evidence. BIO.13-14. But Ohio courts have equated the two burdens in that precise context. *E.g., Ohio v. Anderson*, 2014-Ohio-1849, ¶ 16 (Ohio Ct. App. 2014) (defendant "failed to present clear and convincing evidence establishing a strong probability that the result of the trial would be changed if a new trial was ordered").

Moreover, the State's unstated premise—that the meaning of a given burden of proof varies depending on the underlying claim—is wrong. Whatever the underlying claim or issue, a given burden of proof "allocate[s] the risk of error between the litigants," and the same three basic burdens—preponderance, clear and convincing, and beyond reasonable doubt—apply broadly across "different types of cases." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

The State also argues that Mr. Prade misrepresented the holding in *Ohio v. Gandolfo*, 11 Ohio St. 114 (1860), which the State asserts supports applying the "strong probability" standard. BIO.15. Even apart from the fact that *Gandolfo* is primarily of historical interest, the State again is mistaken. *Gandalfo* required a defendant to show that newly discovered evidence would "at least make it *probable* that the result on another trial will be different." 11

Ohio St. at 119 (emphasis added). The excerpt from *Gandolfo* the State points to addresses when newly discovered evidence is cumulative, not the burden of proof. *Id.*

In the end, the State never says what the "strong probability" burden means—only what it purportedly does not. "Strong" means "having a powerful effect" and "intense in degree or quality," *Webster's New World Dictionary* at 1329 (Simon & Schuster 3d ed. 1988), and a "strong probability" necessarily is well above a mere "probability." But there is no need to speculate about what "strong probability" means. It is "one of clear and convincing evidence." *Ohio v. Ayers*, 923 N.E.2d 654, 658 (Ohio Ct. App. 2009). It is, again, "functionally equivalent to the clear and convincing evidence standard." *Ohio v. King*, 2012-Ohio-4398, ¶ 39 (Ohio Ct. App. 2012) (Stewart, J., dissenting) (citation omitted).

II. OHIO'S ELEVATED BURDEN OF PROOF IS AN EXTREME OUTLIER.

In response to the mountain of authority showing that, both today and for the past two centuries, American jurisdictions other than Ohio have applied a preponderance (or lower) burden of proof to new trial motions based on newly discovered evidence, the State has three responses. First, it points to *Maine v. Twardus*, 72 A.3d 523, 531 (Me. 2013), which purportedly shows that Ohio is "not . . . the outlier that [Mr.] Prade would like this Court to believe." BIO.13-14. The State is correct in the limited sense that *Twardus* is not a model of clarity and appeared to combine the clear and convincing and preponderance standards before settling on the preponderance

standard.[1] 72 A.3d at 531-32. But the State misses the forest for the trees. Even if Maine sometimes references a clear and convincing standard, then both Maine and Ohio are extreme outliers in applying that higher standard.

Next, the State points to a number of states' laws today that purportedly "are [ ] not consistent in how they quantify 'probably.'" BIO.25-27. Nonsense. Of the eleven states on which the State focuses, seven apply a preponderance burden in this context,[2] and the remaining four apply lower standards.[3] There is no "inconsistent quantification" issue.

Finally, the State argues that the historical state and federal practices are not uniform and points to decisions from Virginia, Mississippi, and Vermont. BIO.27-28. But all three set forth what essentially is

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[1] *Compare Maine v. Lewis*, 373 A.2d 603, 611 (Me. 1977) (newly discovered evidence must be "such as will probably change the result'") (citation omitted), *with Maine v. Dechaine*, 630 A.2d 234, 236 (Me. 1993) (evidence must be "convincing" and "probably change the result").

[2] FL: *Sweet v. Florida*, 248 So. 3d 1060, 1068 (Fla. 2018) ("probably"); IA: *Moon v. Iowa*, 911 N.W.2d 137, 151 (Iowa 2018) ("preponderance"); KY: *Foley v. Kentucky*, 425 S.W.3d 880, 888 (Ky. 2014) ("probably"); LA: *Louisiana v. McKinnies*, 171 So. 3d 861, 868 (La. 2014) ("probably"); RI: *Rhode Island v. Drew*, 79 A.3d 32, 38 (R.I. 2013) ("probably"); SD: *South Dakota v. Gehm*, 600 N.W.2d 535, 540 (S.D. 1999) ("probably"); ND: *Ramsey v. North Dakota*, 833 N.W.2d 478, 842 (N.D. 2013) ("probably").

[3] KS: *Kansas v. Thomas*, 891 P.2d 417, 421 (Kan. 1995) ("reasonable probability"); MA: *Massachusetts v. Moore*, 109 N.E.3d 484, 504 (Mass. 2018) ("substantial risk"); MD: *Yorke v. Maryland*, 556 A.2d 230, 235 (Md. 1989) ("substantial or significant possibility"); WI: *Wisconsin v. McAllister*, 911 N.W.2d 77, 86 (Wis. 2018) ("reasonable probability").

a preponderance standard. *Barsa v. Kator*, 93 S.E. 613, 615 (Va. 1917) ("ought to produce, on another trial, an opposite result"); *Cooper v. Mississippi*, 53 Miss. 393, 398 (1876) ("But is it probable that the new evidence would produce a different verdict?"); *Bullock v. Beach & Cloys*, 3 Vt. 73, 76 (1830) ("a conviction that the new evidence would have turned the verdict the other way"). And this claim, too, misses the forest for the trees. Even if a few courts over the past two centuries have applied higher burdens, the "probably produce a different verdict" standard "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." *Silvey v. United States*, 7 Ct. Cl. 305, 308 (1871) (citation omitted).

III. OHIO'S ELEVATED BURDEN OF PROOF VIOLATES THE DUE PROCESS CLAUSE.

When the State reaches the issue of whether Ohio's uniquely elevated standard comports with Due Process, its attempts to justify Ohio's heavier burden fall short. First, the State analyzes whether Ohio's rule passes muster under *Mathews v. Eldridge*, 424 U.S. 319 (1976). BIO.18-22. The State's assertion that society is only "minimally concerned" when new evidence that could not have been discovered at the time of trial makes an acquittal probable (BIO.20) is incredible, and its claim that the petition ignored the fact that this was a postconviction proceeding (*id.*) is incorrect. But the more appropriate analytical framework here is the one in *Medina v. California*, 505 U.S. 437, 445-46 (1992). *See Herrera v. Collins*, 506 U.S. 390, 407 (1993).

Second, pointing to *Martin v. Ohio*, 480 U.S. 228, 236 (1987), the State asserts that neither the current nor the historical practice is dispositive in determining whether a practice or right is fundamental. BIO.23. Yet, while neither the current nor the historical practice alone may be dispositive, it is a different story when they align, and *Martin* does not suggest otherwise. *Martin* found that, although only two states placed the burden of establishing self-defense on the defendant, that rule did not violate Due Process where it was the common-law rule and had been applied well into the twentieth century. 480 U.S. at 235-36.

Where, as here, the current and historical practices are consistent, this Court regularly has found that conflicting rules violate Due Process. *E.g.*, *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Addington*, 441 U.S. 418. That is because "the near-uniform application of a standard that is more protective of the defendant's rights . . . than [the] 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.'" *Cooper*, 517 U.S. at 362 (citation omitted).

Finally, the State argues that Ohio's clear and convincing burden is fundamentally fair because Ohio courts sometimes grant new trial motions based on newly discovered evidence. BIO.28. That Ohio courts sometimes grant new trial motions is true, and, indeed, a postconviction trial court judge did so here. Pet.App.97a. But the State's implicit premise that a burden of proof is fundamentally unfair only when it is nearly impossible to satisfy is wrong. "Standards of

proof, like other 'procedural due process rules[], are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*.'" *Santosky*, 455 U.S. at 757 (citation omitted) (*Santosky*'s emphasis). This Court's burden of proof decisions focus on the "history and widely shared practice as concrete indicators of what fundamental fairness and rationality require." *Schad v. Arizona*, 501 U.S. 624, 640 (1991). And, as detailed above, Ohio's clear and convincing burden at issue here fails both the "history" and "widely shared practice" tests.

This Court's decisions also focus on the "societal judgment about how the risk of error should be distributed between the litigants" in light of "the weight of the . . . interests affected." *Santosky*, 455 U.S. at 755. Ohio's clear and convincing burden fails that test, too. Against the defendant's significant interest in having a jury consider new, previously unavailable evidence that likely would result in acquittal, the state's interest in the finality of criminal judgments neither requires nor warrants Ohio's daunting clear and convincing burden of proof. New trial motions based on newly discovered evidence have significant threshold requirements in addition to the burden of proof (*e.g.*, the evidence could not have been discovered before trial, time limits for filing). *See* Pet.2 n.1. Further, the preponderance burden is a "high standard" that "reflects the profound importance of finality in criminal proceedings." *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). As other jurisdictions have almost universally concluded, the preponderance burden fully protects the state's interest in finality.

Ohio's clear and convincing burden is not only an extreme outlier, it denies a fundamental right, is fundamentally unfair, and violates the Due Process Clause.

IV. THE FEDERAL DUE PROCESS ISSUE WAS FAIRLY PRESENTED BELOW.

It is undisputed that Mr. Prade objected to the burden of proof at issue here at every opportunity. Pet.App.130a n.1, 133a-34a n.1, 127a, 116a-22a. Further, each objection (1) acknowledged that the "strong probability" burden is required by controlling Ohio Supreme Court precedent, while asserting that that burden is too high; (2) argued for a lower, "reasonable probability" burden; and (3) cited to a portion of *Ohio v. Siller*, 2009-Ohio-2874 (Ohio Ct. App. 2009), discussing federal Due Process as authority for the objection. Nonetheless, the State argues that the objections in the trial and intermediate appellate courts (but not in the Ohio Supreme Court) were insufficient. BIO.11.

"[J]urisdiction does not depend on citation to book and verse," *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982) (citation omitted), and the question is whether the courts below had "a fair opportunity to address the federal question that is sought to be presented here." *Adams v. Robertson*, 520 U.S. 83, 87 (1997) (citation and internal quotations omitted). "[I]f the record as a whole shows either expressly or by clear intendment that" the claim was "brought to the attention of the state court with fair precision and in due time," then "the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

Here, the objections' references to *Siller*'s discussion of the federal Due Process issue raised the federal Due Process issue. In *Siller*, as here, the defendant filed a motion for a new trial under Ohio R. Crim. P. 33 based on (1) post-trial scientific testing that produced highly material new evidence and (2) important testimony by a prosecution witness having later been shown to be unreliable. 2009-Ohio-2874, ¶¶ 34-39. *Siller* observed that "the United States Supreme Court [had] held this issue is one of due process" and noted this Court's observation that "[u]nder the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *Id.* ¶ 51 (citations omitted). And *Siller* found that, while the "strong probability" standard had been satisfied there, that standard conflicts with the federal Due Process Clause based on its examination of five decisions from this Court in the distinct but analogous context where courts evaluated the required showing by the defendant with respect to new evidence resulting from prosecutorial misconduct or ineffective assistance of counsel. *Id.* ¶¶ 44-53.

Howell v. Mississippi, 543 U.S. 440 (2005) (per curiam), is instructive. *Howell* first observed that a "daisy chain . . . depend[ing] upon a case that was cited by one of the cases that was cited by one of the cases that petitioner cited" is insufficient. *Id.* at 443. But *Howell* contrasted the situation there with the different situation where the petitioner "cite[s] . . . cases directly construing" the Constitution. *Id.*

Unlike in *Howell*, there was no "daisy chain" here; instead, the trial and intermediate appellate court objections both pointed to a portion of one decision—

Siller—that "directly construe[d]" this Court's federal Due Process decisions at length. That citation meant that the objection was based on federal Due Process and, thus, fairly presented the federal issue. *See Howell*, 543 U.S. at 443; *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (objection that lack of instruction "invoked 'fundamental [principles] of judicial fair play' . . . should have sufficed to alert the trial judge to petitioner's reliance on due process principles"); *Braniff Airways, Inc. v. Nebraska State Board*, 347 U.S. 590, 598-99 (1954) ("Though inexplicit, we consider the due process issue within the clear intendment of [petitioner's] contention and hold such issue sufficiently presented.") (citation omitted).

The fact that the trial and intermediate appellate courts ignored the federal Due Process issue certainly is no indication that it was not fairly presented to them given the unbroken string of Ohio Supreme Court decisions applying the "strong probability" burden dating back nearly a century. *See Ohio v. Keeling*, 2015-Ohio-1774, ¶ 9 (Ohio Ct. App. 2015) ("inferior court[s] must follow the controlling authority of a higher court, leaving to the higher court the prerogative of overruling its own decision") (citation omitted). The federal Due Process issue was fairly presented not only to the Ohio Supreme Court, which the State concedes, but also to the trial and intermediate appellate courts below.

V. THIS CASE IS AN IDEAL VEHICLE TO CORRECT OHIO'S UNCONSTITUTIONAL BURDEN OF PROOF.

The State argues at length that the circumstantial and indirect eyewitness testimony at trial was

overwhelming and, thus, that the newly discovered evidence could not matter. BIO.1-11. Yet the actual jurors neither shared the State's view of the evidence the State points to, *see* Pet App.140a, 142a, nor knew as we now do that:

> (1) there was male DNA over the killer's bite mark on the victim that, to a 100% certainty, was not Mr. Prade's DNA;
>
> (2) consistent with some of that male DNA having come from the killer's bite, testing over the bite mark detected the enzyme in saliva, as well as epithelial (skin) cells that commonly are present in saliva;
>
> (3) as between the two possible sources of the male DNA found over the killer's bite mark—*i.e.*, the killer's bite or stray contaminating DNA from touching—the killer's bite was a strong DNA source, while causal touching is a weak DNA source; and
>
> (4) DNA testing of other locations on the victim's clothing designed to look for stray, contaminating male DNA found no traces of DNA.

Far from hearing evidence that the killer's bite points to Mr. Prade's innocence, the jurors heard just the opposite. One of the State's forensic "experts" opined that Mr. Prade made the bite mark and another opined that it was consistent with Mr. Prade's dentition—opinions the actual jurors found compelling. Pet.App.141a. Yet post-trial scientific advances have shown that bite mark identification opinions are highly unreliable. The bite mark opinions provided in Mr. Prade's trial now are

prohibited by professional standards and would be inadmissible in a new trial. *See* Pet.App.146a-52a.

The newly discovered DNA and bite mark identification evidence here goes directly to the issue of guilt or innocence and raises grave doubts about the reliability of Mr. Prade's conviction. It convinced a postconviction trial judge that Mr. Prade had met the daunting standard for actual innocence. Pet.App.97a. It convinced an Ohio Supreme Court Justice that there is "no doubt that this case needs to go to a new jury." *Ohio ex rel. Prade v. Ninth Dist. Ct. App.*, 87 N.E.3d 1239, 1245-46 (Ohio 2017) (O'Neill, J., dissenting).

The new evidence here surely makes it probable that Mr. Prade would be acquitted in a new trial. This case is a perfect vehicle for this Court to correct the unconstitutionally elevated burden that Ohio places on defendants seeking a new trial based on newly discovered evidence.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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