No. 19-6567

IN THE SUPREME COURT OF THE UNITED STATES

Danny Lee Hill,
Petitioner

-v-s-

THE STATE OF OHIO
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

STATE OF OHIO'S RESPONSE TO DANNY LEE HILL'S QUESTION PRESENTED

The Respondent State of Ohio ("State of Ohio") submits to this Court that Petitioner, Ohio death row inmate, Danny Lee Hill ("Hill") presents no question worthy of review. Twenty-eight (28) years post-conviction, Hill requested a new trial on the grounds of "newly discovered evidence." Hill sought out and obtained a new "expert opinion" in an attempt to controvert the testimony of a renowned forensic odontologist who opined bite marks found on the victim's body were likely inflicted by Appellant. Hill argues that his conviction and death sentence was "based on now recognized debunked unscientific evidence" and that he is entitled to a new trial. This is patently false.

The State acknowledges that a review of the horrific facts and circumstances surrounding the torture and death of a 12-year-old child is unsettling; however, such review reveals a crucial point: That the "new evidence," procured and produced by Appellant nearly three decades after he committed this vile act of violence upon a young boy, has no effect whatsoever in determining whether that child was raped, anally or orally. Thus, the "new evidence" will certainly have no impact on the State's evidence that Appellant viciously and systematically murdered Raymond Fife. As such there is no probability, much less a strong probability, that the result would be different if a new trial was granted due to Appellant's reinterpretation of the original evidence presented at trial. Moreover, the bite mark evidence was not material to the Appellant's convictions. Thus, no compelling reason to grant this petition exists as required by Supreme Court Rule 10, and said petition should be denied.

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CONSTITUTIONAL PROVISION NOT INVOLVED

Hill argues his constitutional rights to a fair trial were violated because testimony was introduced regarding bite-mark evidence which identified Hill as the individual responsible for leaving the bite-marks in his 1986 trial. Specifically, Hill asserts that he is entitled to a new a trial because the bite-mark evidence used in his trial over three decades ago would now be deemed inadmissible.

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947), remains the guiding authority as to when an Ohio trial court is required to restage a criminal trial due to "newly discovered evidence" and when it is not. The Ohio Supreme Court has held: "[t]o warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (State v. Lopa, 96 Ohio St. 410, 117 N.E. 319 [1917], approved and followed.)." *State v. Petro*, syllabus.

The State submits that Petro is wholly dispositive of this appeal just as it was in the courts below. The State acknowledges that a review of the horrific facts and circumstances surrounding the torture and death of a 12-year-old child is unsettling; however, such review reveals a crucial point: That the "new evidence," procured and produced by Hill nearly three decades after he committed this vile act of violence upon a young boy, has no effect whatsoever in determining whether that child was raped, anally or orally. Thus, the "new evidence" will certainly have no impact on the State's evidence that Hill viciously and systematically murdered Raymond Fife. As such there is no probability, much less a strong probability, that the result would be different if a

new trial was granted due to Hill's reinterpretation of the original evidence presented at trial. Moreover, the bite mark evidence was not material to the Hill's convictions. This is not a case of an "arbitrary or wrongful conviction."

Hill's characterization of the bite-mark evidence as the "linchpin' in his 1986 trial is patently false. Indeed, both the trial court and the Eleventh District Court of Appeals noted this important point. The trial court's found "*even if* the court were to conclude***that the bite mark evidence is unreliable and could not be introduced in a future trial, **there is no probability**, must less a strong probability **that a new trial would result in a different outcome**." Hill's Petition, at A-2, p. 42. (Emphasis added).

The Eleventh District Court of Appeals found that conclusion supported by the evidence presented at trial, specifically "[t]hat [Hill] was present during the attack cannot be seriously questioned. The issue is whether his active participation can be inferred from his efforts to conceal his involvement and to place the blame on others. Such inference is legally permissible and, given the facts of the present case, compelling." *State v. Hill*, 11th Dist. No. 2016-TR-99, 2018-Ohio-4800, ¶80.

Finally, Hill's reexamination of the evidence is cumulative to the trial evidence and merely impeaches or contradicts the former evidence. Therefore, Hill's motion for new trial, fails the *Petro* test entirely. As such, it was not error to deny Hill's motion for new trial. Thus, no constitutional provision is involved in this case, and no compelling reasons to grant this petition exist as required by Supreme Court Rule 10.

STATEMENT OF THE CASE

After trial, Hill was convicted by a three-judge panel which found him guilty, beyond a reasonable doubt, of four separate death penalty specifications and four additional counts of kidnapping, rape, aggravated arson, and felonious sexual penetration. Notably, the indictment in

this case did not specify whether Hill engaged in anal or oral sex with the victim, just that he "engaged in sexual conduct" with a victim less than 13-years of age. The three-judge panel sentenced Hill to death on the aggravated murder charge.

The State is mindful that this Court does not have before it the voluminous transcripts and numerous exhibits presented by the State in 1986 to convict Hill of the aggravated murder of Raymond Fife, a 12-year-old Warren boy snatched from his bicycle, sexually assaulted and tortured to death on September 10, 1985. However, Ohio's Eleventh Appellate District and Supreme Court of Ohio have detailed that evidence at length during the initial review of Hill's conviction and death sentence. *State v. Hill*, 11th Dist. Trumbull Nos. 3720 and 3745, 1989 WL 142761 (Nov. 27, 1989), and *State v. Hill*, 64 Ohio St.3d 313, 595 N.E.2d 884 (1992). This Court denied certiorari. *Hill v. Ohio*, 507 U.S. 1007, 113 S.Ct. 1651, 123 L.Ed.2d 272 (1993).

Generally, Respondent, the State of Ohio ("the State"), takes no exception to the recitation of the docket as it relates to Hill in his Statement of the Case at pages 2 through 7 of his memorandum. However, the State takes issue with several representations made by Hill in this section. As noted by Hill, on December 21, 2015, Judge Cosgrove conducted a hearing to determine, pursuant to Crim. R. 33(B), whether Hill was "unavoidably prevented" from discovering Dr. Wright's opinion challenging the bite mark evidence introduced during the 1986 trial.

The State declines to adopt any description of Dr. Franklin Wright as "a qualified and well respected forensic odontologist" and completely disavows Dr. Wright's defense-serving statements that the State's now-deceased dental expert at trial, Dr. Curtis Mertz, would change his testimony regarding the bite marks rendered at trial. Hill's Petition, at pp. 5, 29. The State also disagrees with Hill's characterization at page 5 that "profound developments in the field of bite-

mark analysis*** confirm the scientific invalidity and intrinsic unreliability of Dr. Mertz's testimony at [Hill's] trial." *Id.* While the State is mindful that this Court does not have the transcripts of the proceedings before it, it is worth noting that, while Hill touts the 2013 ABFO updates as "profound," Dr. Wright, Hill's hired expert, testified at the hearing that the 2013 changes have prompted him to change *none* of *his* professional opinions rendered over a 28-year career in this specialty.

On June 7, 2016, the visiting judge granted Hill leave to file his woefully belated motion for new trial. *Hill*, 2018-Ohio-4800, ¶ 8. Specifically, Judge Cosgrove, in granting Hill's motion for leave "determined that the Petitioner was 'unavoidably prevented' from filing the motion within the time parameters of Crim.R. 33(B). The***decision***was based in large measure on the guidelines enacted in 2013 by the American Board of Forensic Dentistry ('ABFO')." Hill's Petition, A-1, p. 10. As noted by the visiting judge in her opinion denying the Motion For New Trial, "those guidelines "did not recognize the identification of a specific individual as a 'biter' in the *open* population." Hill's Petition, A-2, p. 23 Importantly, this case does ***not*** include an open population.

Hill also references affidavits by Zhongue Hua, a pathologist who is completely unqualified to assess bitemark evidence, and Debra Davis, a psychologist whose belated opinion was submitted for the sole purpose of undermining the admissibility and/or reliability of Hill's 1986 statement to Warren City Police. Hill's Petition, p. 6. As this Court is well aware, the admissibility of Hill's 1986 interrogation has been well-trod legal ground for decades. Not one state or federal court has found his blame shifting statements involuntarily coerced or inadmissible. *State v. Hill,* 11th Dist. Nos. 3720, 3745, 1989-WL-142761 (Nov. 27, 1989), *5-8; *State v. Hill* 64 Ohio St. 3d 313, 318-319, 1992-Ohio-43.

When Hill filed his motion for new trial, he recycled the plethora of affidavits affixed to his motion for leave which had nothing to do with the bite mark evidence and for which there had been absolutely no testimony as to how he was "unavoidably prevented" from generating sooner. The State responded with a Motion to Strike because the Motion For New Trial far exceeded the subject matter of the December 21st hearing which dealt with the bite mark evidence exclusively.

The trial court determined that, Hill's June 13, 2016 Motion for New Trial:

> "'included issues that were never raised in his prior motion for leave to file a new trial motion.' These issues included 'the voluntariness of Hill's statements given to the Warren Police Department after the murder of Raymond Fife in 1985' and Dr. Adelman's testimony regarding 'the stick or broomstick handle that was introduced by the State at Hill's trial.' The court found these additional claims, 'unilaterally added by Petitioner in his motion for new trial,' to be redundant, impertinent, and immaterial under Civil Rule 12(F). Moreover, the court found 'any further discussion of these claims * * * barred by the 'law of the case' doctrine and 'res judicata.' 'The court ordered these claims stricken."

State v. Hill, 11th Dist. No. 2016-TR-99, 2018-Ohio-4800, ¶13.

After considering Hill's motion and the State's response, the visiting judge denied Hill's motion for new trial without hearing on October 3, 2016. *Id.,* ¶12. Specifically, the trial court concluded that, "*even if* the bite mark evidence is excluded, considering the totality of the evidence against the Petitioner, particularly on the Kidnapping specification, Petitioner has failed to demonstrate a 'strong probability' that there would be a different outcome if a new trial were granted in this case." (Emphasis added). *Id.,* ¶14. The trial court "noted [in its decision] that the 'Ohio Supreme Court thoroughly reviewed the sufficiency of the evidence in this case when it affirmed the Petitioner's convictions,'" and the "majority of the Court's findings on sufficiency had nothing to do with the bite mark evidence." *Id.*

In short, the visiting judge concluded that if the bite mark evidence were extracted from the record, Hill failed to demonstrate a "strong probability" that there would be a different outcome if a new trial were granted in the case, therefore the "newly discovered evidence" presented by

Hill does not surpass the long-standing guidelines of *State v. Petro,* 148 Ohio St. 505, 76 N.E. 2d 370 (1947). Hill appealed to the Eleventh District Court of Appeals which affirmed the trial court's conclusions. *Hill,* 2018-Ohio-4800. It is also worth noting that while there is one dissenter, the dissenting opinion is based upon the doctrine of mootness claiming "any decision" rendered by the Eleventh Hill District has no practical significance." *Id.,* ¶¶ 101, 106). The dissenting opinion does not reach the merits.

Hill appealed to the Ohio Supreme Court. Ohio's High Court affirmed the trial court's decision on June 12, 2019. *State v. Hill*, 156 Ohio St. 3d 1405, 2019-Ohio-2261, 123 N.E.3d 1040. Hill now seeks a writ of certiorari.

STATEMENT OF THE FACTS

Hill was convicted by a three-judge panel which found him guilty, beyond a reasonable doubt, of four separate death penalty specifications and four additional counts of kidnapping, rape, aggravated arson, and felonious sexual penetration. Notably, the indictment in this case did not specify whether Hill engaged in anal or oral sex with the victim, just that he "engaged in sexual conduct" with a victim less than 13-years of age. The three-judge panel sentenced Hill to death on the aggravated murder charge. While Appellant repeatedly attempts to label himself as developmentally disabled, no court other than the recently reversed Sixth Circuit Court of Appeals has ever found Appellant to be intellectually disabled and this Court should disregard Appellant's claim.

Counsel for the State is struck with how Hill's Statement of Facts from pages 6 through 17 of his petition paint Hill - rather than Raymond Fife - as the victim. The State takes seriously its obligation to bring this matter into a proper judicial focus. With that in mind, the State would like to highlight facts from the record which demonstrate why Hill's manufactured "evidence" is not

remotely outcome determinative and why the visiting judge correctly denied his motion for new trial without hearing.

Again, the State is mindful that this Court does not have before it the voluminous transcripts and numerous exhibits presented by the State in 1986 to convict Hill of the aggravated murder of Raymond Fife, a 12-year-old Warren boy snatched from his bicycle, sexually assaulted and tortured to death on September 10, 1985. However, the Eleventh Appellate District and the Ohio Supreme Court have detailed that evidence at length during the initial review of Hill's conviction and death sentence. *State v. Hill*, 11th Dist. Trumbull Nos. 3720 and 3745, 1989 WL 142761 (Nov. 27, 1989), and *State v. Hill*, 64 Ohio St.3d 313, 595 N.E.2d 884 (1992).

Testimony from Hill's 1986 trial shows that on the night of September 10, 1985, the victim, Raymond Fife, left his parents' home to meet up with a friend, a fellow Boy Scout troop member, Billy Simmons. *Hill*, 64 Ohio St.3d 313. Raymond would cut through the wooded field with bicycle paths located behind the Valu–King store on Palmyra Road in Warren, Trumbull County, Ohio to get to a friend's residence. *Id.*

During this time, three students from a nearby high school were in the area of the Valu-King. Matthew Hunter, testified that upon reaching Valu–King, he saw Tim Combs and Hill walking in the parking lot towards the store. After purchasing some items in the Valu–King, Hunter observed defendant and Combs standing in front of a nearby laundromat. Combs greeted Hunter as he walked by. Hunter also saw Raymond Fife at that time riding his bike into the Valu–King parking lot. Darren Ball testified that he and Troy Cree left football practice at approximately 5:15 p.m. and walked to a trail located behind the Valu–King where he and Cree saw Combs walking in the opposite direction from the Valu–King. "Upon reaching the edge of the trail close to the Valu–King, Ball heard a child's scream, 'like somebody needed help or something.'" *Id.* Donald

E. Allgood, testified that he and a friend were walking in the vicinity of the Valu-King between 5:30 p.m. and 6:00 p.m. and noticed Hill, Combs and two other persons leaving the field by the Valu-King, He also saw Hill throw a stick back into the woods and observed Combs pull up the zipper of his blue jeans. *Id.*

When Raymond never showed up at his friend's home, Simmons became worried, and called Raymond's parents. *Id.* The Fife's called police and began searching for Raymond. *Id.,* at 314. Approximately four hours after the attack, at approximately 9:30 p.m., Mr. Fife found his son, barely clinging to life, in the wooded field behind the Valu-King. *Id.* Twelve-year-old Raymond was naked, with his underwear tied around his neck and appeared to have been lit on fire. *Id.* Raymond was severely beaten with burns on his chest, neck, and face. *Id.* His groin was swollen and bruised, and his rectum appeared to have been torn and was bleeding. *Id.* Raymond was rushed to St. Joseph's Riverside Hospital, but died from his injuries two days later. *Id.*

Dr. Howard Adelman, a forensic pathologist, co-director for laboratories for St. Joe's, former Deputy Chief Medical Examiner for Suffolk County New York for eight years, and the pathologist for the infamous Amityville Horror murders in Long Island, took more than six hours to autopsy Raymond on September 13, 1985. Among the external injuries noted by Dr. Adelman were a ligature mark around his neck, second and third degree burns, and multiple contusions and abrasions, including what appeared to be bite marks on Raymond's penis. *Id.* Even in death, Raymond had profuse bleeding from his rectal area. *Id.* With respect to the rectal bleeding, Dr. Adelman testified the victim had been impaled with an object inserted through the anus which then penetrated the rectum and urinary bladder. *Id.* Raymond's internal injuries were equally extensive. Dr. Adelman testified the lad suffered from a subdural hemorrhage on the left side of his head. *Id.* These several cited injuries which, independent of one another, the subdural

hemorrhage, the perforation of the rectum and urinary bladder, the strangulation, beatings and burns *each* could have caused Raymond's death. Trumbull County Coroner Dr. Joseph Sudimack testified that Raymond's injuries were so extensive that it was impossible to pinpoint a single injury as the cause of death. His report states the cause of death as cardio respiratory arrest, secondary to asphyxiation and subdural hematoma and multiple trauma. *Id.* As will be discussed, *infra,* Hill had an explanation for every one of these injuries, even if he blamed them on someone else.

Before Raymond's body was removed from the hospital, Dr. Adelman contacted Dr. Curtis Mertz, a renowned expert in the field of forensic odontology and the first president of the American Board of Forensic Odontology, to examine what Dr. Adelman surmised were bite marks on the boy's penis. *State v. Hill,* 1989 WL 142761, at *1.

The night Raymond died, Hill appeared of his own volition at the Warren Police Department where he encountered Sgt. Thomas Stewart, an officer known to Hill since he was a small child, to inquire about the $5,000.00 reward for information concerning Raymond's murder. *Hill*, 64 Ohio St.3d 313, 314. Hill volunteered, without any prompting from Sgt. Stewart, that he had seen a Maurice, AKA Reecie, Lowery riding Raymond's bike. Hill described Raymond's bicycle, a maroon dirt bike with nub wheels, in considerable detail, as well as the fact that Raymond's underwear was around his neck. *Id.* He acknowledged knowing Timothy Combs, but insisted he hadn't seen him "since he's been out of the joint." He also knew of Combs' predilection for engaging in anal sex with young white boys. *Id.* As for Hill's own whereabouts the night of the assault, he claimed he was home sleeping, the first of many false alibis he would give.

An important fact concerning the Fife homicide investigation should be understood at this juncture: Even as late as September 16, 1985, a full six days after Hill and Combs attacked

Raymond, Warren Police had deliberately suppressed the details of Raymond's injuries from the local news media. *State v. Hill,* 1989 WL 142761, at *1. As such, Hill's initial statement was riddled with information that had not been publicly released. *Id.*

As news spread about the Fife homicide, several private citizens stepped forward with information. Among them was Donald Allgood, who on September 15, 1985, selected Hill and Combs from an eight-person photo spread at the police department as two of the people he saw that night at the Valu-King. He also accompanied Det. James Teeple back to the path and showed the detective where Hill had thrown the "stick" the night of the assault, where Det. Teeple later recovered what appeared to be a broken broom handle from the brush near the Valu-King. Just a day later, Hill would describe this "stick" to Warren Police with considerable particularity. *Id.* Dr. Adelman, the pathologist who performed the autopsy of the victim's body, testified that the size and shape of the point of the stick found by police was "very compatible" with the size and shape of the opening through the victim's rectum and the stick fit in the victim's rectum as "very similar to a key in a lock." *Hill,* 64 Ohio St. 3d 313, 317.

On September 13, 1985, Sgt. Steinbeck and Hill's uncle, Det. Morris Hill, appeared at Hill's home the morning of September 16' 1985 and requested he and his mother return to the Warren Police Department to sign the statement. They did. *Id,* at 315. In short, Hill denied his involvement and offered an alibi. Hill agreed to an audio-taped interview and he signed two rights waiver forms. *Hill*, 64 Ohio St.3d 313, 315. Hill claimed Timothy Combs initiated the assault by head slamming Raymond as he peddled by on his bike. *Id.* This rendered the child unconscious, and Combs ripped the boy's shorts off and anally raped him. *Id.* Raymond regained consciousness, but Combs ran back, kicked him in the head and started to choke him. *Id.* Combs, according to Hill, placed his foot on the boy's stomach and started yanking on his penis. *Id.* Hill then indicated

that Combs took something like a broken broom stick and "jammed it into the victim's rectum." *Id.*

Hill also stated that Combs then lit the boy on fire with lighter fluid Combs bought from the Valu-King while Hill stood watch. *Id.* During the interview, Hill told police he had washed the pants he was wearing the night of the attack. This fact was corroborated by his younger brother, Raymond Vaughn, who testified he saw Hill washing his pants the night of September 10th, 11th and 12th in the family bathtub. *Id.*, at 316. According to Vaughn, the pants had something red on them. "It looked like blood to me." *Id.* No blood was found on Hill's pants by forensic analysts after potentially three washes in the family bathtub. Hill attempts to debunk this possibility by arguing that it is highly unlikely that Hill could wash that evidence away due to his "intellectual disability and significant deficits in adaptive function." Hill's claim regarding his alleged intellectual disability has been rejected by State courts, including this one which declined to review Hill's *Atkins v. Virgina* claim. *State v. Hill*, 177 Ohio App.3d 171, 2008-Ohio-3509 and *State v. Hill,* 122 Ohio St. 3d 1502, 2009-Ohio-4233. Hill completely ignores the fact that he was "smart" enough to try to fabricate a story to collect a reward, to make up an alibi, and to evolve his story as he was presented with additional, incriminating facts.

However, at this point in the investigation, it is clear that two perpetrators were involved, Hill and Combs. Hill adamantly denied either he or Combs bit Raymond. Though Hill denied having bitten Raymond, dental impressions and photographs were taken of both Hill and Combs, the only two people at the crime scene other than the victim. These impressions and photographs were submitted to at least two forensic odontologists, the late Dr. Curtis Mertz who was called by the State and Dr. Lowell Levine who was called by the Hill. *Hill,* 64 Ohio St. 3d 313, 316, 327. Dr. Mertz testified, "[i]t's my professional opinion, with [a] reasonable degree of medical

certainty, that's Hill's teeth, as depicted by the models and the photographs that I had, made the bite on Fife's penis." *Id.* at 316. According to Dr. Mertz's examination of Hill's dental impressions, which he did not see until more than a week after viewing Raymond in the morgue, Hill at the time had a chipped and rotated, upper right central incisor on the incisal edge and a space (diastema) between the 8 and 9 teeth (upper right central, upper left central teeth). Dr. Mertz is now deceased. Dr. Levine agreed with Dr. Mertz that the injuries to the victim's penis were made by human teeth; however, unlike, Dr. Mertz, he could not conclude that Hill, and not Combs, had made all the marks. *Id.* Except, Dr. Levine testified that there was one area most likely to have been made by Hill. *Id.* While not included in the opinions by the courts below, at the State's request, Dr. Levine re-reviewed the evidence and his testimony from 1986 and concluded that the injuries were consistent with human bite marks.

Also absent from Hill's Statement of Facts is the testimony presented at trial which showed that Hill is not just a twice convicted sex offender, but he is a biter. "Candyce S. Jenkins testified that in March 1984, defendant went to her house, broke a window with his fist, and entered the premises carrying a knife. Jenkins stated that defendant raped her twice anally, once vaginally, and made her perform fellatio on him." *Hill*, 64 Ohio St. 3d 313, 322. She also testified that "[Hill] bit her on the back and on the breast during the rape, and told her that he was going to stick the knife up her rectum, cut out her vagina and cut off her breasts." *Id.* According to Jenkins, Hill threated to rape her baby, who is another room, and cut her up. *Id.* She escaped from Hill while he was putting his pants on. Jenkins testified Hill then fled to the field behind the Valu–King. *Id.* Hill pled guilty to the rape in juvenile court. *Id.*

"Mary Ann Brison testified that she was raped at knifepoint by defendant on the morning of February 8, 1984 while walking on a path leading from the Valu–King." *Id.* Stephen Melius, a

former cellmate of Hill in the Juvenile Justice Center stated that Hill put his hand on him and expressed a desire to perform anal intercourse and fellatio on him during the winter of 1984; Hill's advances were denied. *Id.*

The three-judge panel returned a verdict of guilty on all counts except the aggravated robbery of the bike. *Id.*, at 317. With these well-established facts in mind, the visiting judge denied Hill's Motion for New Trial without hearing on October 3, 2016. That decision is the subject of Hill's petition.

Hill presents at p. 14 of his petition, that "[i]n August 2013—in response to the NAS report, and dozens of wrongful convictions and indictments, subsequent lawsuits, and mounting criticism from independent researches—the ABFO conceded the invalidity of individualization claims in "open" or "undefined population" cases (like Mr. Hill's) in which the universe of potential suspects is unknown." This is patently false. This case involved two identified suspects, Hill and Mr. Combs. Hill's presence at the crime scene "cannot be seriously questioned." *Hill*, 2018-Ohio-4800, ¶ 80. Thus, there are only two possible biters in this case. In other words, this case involves a *closed* population. While Hill's claim that the ABFO has now eliminated individualization and identification from its approved conclusions in *open-field cases*, Hill provides absolutely nothing to suggest said identification cannot be done in closed-population cases. In fact, Hill's paid expert testified that he believed in cases with a closed population, one could very reliably use bitemark evidence for biter exclusion or biter identity. *State v. Prade*, 9th Dist. Summit No. 26775, 2014-Ohio-1035, ¶100. Specifically, the Ninth District noted:

> "According to Dr. Wright, biter identification in an open population, meaning one where anybody in the world can be the biter, is "simply not supported." By that same token, if a closed population of suspected biters had similar teeth, Dr. Wright opined that it "would be very difficult, if not impossible, even with a great bite[ ]mark * * * to separate those individual dentitions because of the similarity of the teeth." Nevertheless, Dr. Wright opined that, when a limited population of

> suspected biters exists and the suspected biters have different dentitions, "I think very reliably you can use bite[ ]mark analysis for biter exclusion or biter identity." Dr. Wright defined a closed population as "the suspected population of people who had contact with that victim at the time that the event occurred."

Id.

Hill's case represented one such "closed population" case about which Dr. Wright testified in Prade. The only two suspected biters to have had contact with the victim were Appellant and his co-defendant, Timothy Combs. See, *State v. Combs*, 11th Dist. No. 1725, 1988 WL 129449 (Dec. 2, 1988). While Hill quotes two studies critical of the ABFO's guidelines post-2013, Hill grossly misstates that these guidelines deem the bitemark evidence inadmissible at a future trial. The courts below found it noteworthy that the bite-mark evidence did not appear overly persuasive to previous reviewing courts: "***[T]the Ohio Supreme Court decision affirming Petitioners convictions [*State v. Hill,* 64 Ohio St. 3d 313, 1992-Ohio-43] only briefly mentioned the bitemark testimony as one of many factors supporting the sufficiency of the totality of the evidence." Hill's Petition, A-2, p. 37. The "Ohio Supreme Court thoroughly reviewed the sufficiency of the evidence in this case when it affirmed the Petitioner's convictions," and the "majority of the Court's findings on sufficiency had nothing to do with the bite mark evidence." *State v. Hill,* 2018-Ohio-4800, ¶ 14.

The trial court stated:

> "The relevancy of the bite-mark testimony was a factor in proving whether Hill's mouth came into contact with the victim's penis (oral sex). The bite mark evidence had no relevance on the question of whether Hill had anal intercourse with Fife. In one of Hill's statements made to police, he admitted that [at] one point during the attack, he turned the victim over to see if 'he was still breathing.' (Petitioner's Exhibit M, pg. 25). This statement is somewhat incredulous considering that by Hill's own admissions, he did nothing to help the boy escape, did not seek medical attention for Fife, even when he was alone with him and never attempted to intervene in the protracted torture of the victim.
>
> " **Most importantly, the bite mark evidence does nothing to vitiate the sufficiency of the overwhelming evidence against the Petitioner on the Kidnapping specification to the Aggravated Murder count. The Kidnapping specification provides a separate**

and independent basis for the imposition of the death penalty in this case.***Even if this Court were to conclude based on today's advances in forensic odontology and ABFO guidelines, the bite-mark evidence is unreliable and could not be introduced in a future trial, there is no probability, much less a strong probability that a new trial would result in [a] different outcome.***"

Hill's Petition, A-2, p. 42. (Bold original)

The visiting judge accurately noted that penile bites did not kill Raymond Fife. "At no time, did Dr. Adelman testify that the victim died from being bitten on the penis." Hill's Petition, A-2, p. 38. The visiting judge quoted extensively from the Eleventh District Court's findings regarding the sufficiency of the evidence regarding the rape charge at page 33 and 34 of her opinion. Of specific importance, "Hill's own statement indicated he remained with the victim while Combs absented himself from the scene, and that he did not go for help. This direct evidence base provides, at the very least, that Hill was the only other person when the victim was experiencing the pinnacle of excruciating pain from these egregious assaults." *State v. Hill*, 11th Dist. Trumbull No. 3720, 1989 WL 142761, *30, *aff'd,* 64 Ohio St.3d 313, 1992-Ohio-43, 595 N.E.2d 884 (1992). The victim's screams were heard by passerbys, screams that occurred while Hill was alone with Raymond Fife. Since Ball and Cree eyeballed only Combs and not Hill, it is readily apparent who was responsible for those screams and who actively participated in the continued torture of Raymond even in Combs' absence.

The visiting judge found that the bitemark evidence merely "contradicts and impeaches the trial evidence" and therefore does not trigger a new trial. *State v. Petro*, 148 Ohio St. 505, 76 N.E. 2d 370 (1947)." Hill's Petition, A-2, p. 45. The visiting judge continued: "More significantly, however, when considering the sufficiency of the evidence on the Aggravated Murder count and the death penalty [s]pecifications, in particular, the Kidnapping specification, the evidence does not create a strong possibility that the outcome would be any different if a new trial were granted pursuant to Crim. R. 33." *Id.* The trial court denied Hill's motion for new trial.

The Eleventh District Court of Appeals affirmed finding:

> "The foregoing evidence fairly supports the trial court's conclusion, '[e]ven if this Court were to conclude based on today's advance in forensic odontology and the ABFO guidelines, that the bite-mark evidence is unreliable and could not be introduced in a future trial, there is no probability, much less a strong probability that a new trial would result in a different outcome.' That Hill was present during the attack cannot be seriously questioned. The issue is whether his active participation can be inferred from his efforts to conceal his involvement and to place the blame on others. Such an inference is legally permissible and, given the facts of the present case, compelling. [citations omitted]
>
> Although the foregoing analysis focuses on the sixth _Petro_ factor, the trial court noted without elaboration that '[t]here is no question that the advancements in forensic odontology impeach and contradict the trial testimony of the experts.' Further considering this _Petro_ factor, it is noteworthy that Hill's trial counsel raised many of the same arguments advanced by Hill as newly discovered evidence, albeit without the endorsement of expert witnesses. Hill's bite-mark evidence is to a degree cumulative.***"
>
> *Hill,* 2018-Ohio-4800, ¶¶80-81.

The Ohio Supreme Court declined jurisdiction. *State v. Hill*, 156 Ohio St. 3d 1405, 2019-Ohio-2261, 123 N.E.3d 1040. Other relevant facts will be brought to Court's attention below.

REASONS FOR DENYING THE WRIT

I. In Ohio, a convicted criminal defendant is not entitled to a new trial where there is no "Strong probability" of a different result at a new trial due to "newly discovered evidence."

"'With regard to a motion for new trial, the allowance or denial is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.' *State v. Haynes,* 11th Dist. Ashtabula No.2012–A–0032, 2013–Ohio–2401, ¶ 68, citing *State v.[Danny Lee] Hill*, 64 Ohio St.3d 313, 333, 595 N.E.2d 884 (1992). Regarding this standard, the term 'abuse of discretion' is one of art, connoting the trial court's 'failure to exercise sound, reasonable, and legal decision-making.' *State v. Beechler*, 2d Dist. Clark No. 09–CA–54, 2010–Ohio–1900, ¶ 62, quoting Black's Law Dictionary 11 (8th Ed.2004)." *State v. Rice*, 11th Dist. No. 2012-A-0062,

2014-Ohio-4285, ¶ 9.

As noted above, *Petro, supra* remains the ultimate authority as to when an Ohio trial court is required to restage a criminal trial due to "newly discovered evidence" and when it is not. "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa,* 96 Ohio St. 410, 117 N.E. 319 [1917], approved and followed.*)."* *Petro,* syllabus. (1947). *Petro* requires a criminal defendant to convince a trial court that in the event of a retrial with newly discovered evidence must disclose a "strong probability" the new trial will result in a different outcome. Parenthetically, in the federal system, a defendant challenging his conviction on newly discovered evidence must demonstrate that the evidence is likely to result in an acquittal upon retrial. *United States v. Nunez,* 9 Fed.Appx. 28, 31 (1st Cir.2001). See, also, *United States v. Winters*, 600 F.3d 963, 970 (8th Cir.2010).

The State submits that Petro is wholly dispositive of this appeal just as it was in the courts below. Hill seeks this Court to override Ohio's long-standing precedent in *Petro*. Hill does not present a compelling a reason for this Court to change that long-standing precedent. Hill's "newly discovered evidence" does not satisfy the prongs of *Petro* and his motion for new trial was properly denied. Thus, Hill's petition should also be denied.

A. Old Evidence, New Theory: Not "Newly Discovered Evidenced"

The State's position has long been that *none* of the expert opinions affixed to Hill's mammoth motion for leave or motion for new trial constitutes "newly discovered evidence." At

best, they contained nothing more than recently drafted re-examinations and re-evaluations of very old evidence. Hill's motion for new trial was untimely filed: *Very* untimely filed by over a quarter of a century. In order to overcome the mandate that a motion for new trial be filed within four months - not nearly three decades - after trial, a convicted defendant must demonstrate "by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely***." Crim. R. 33(B).

Hill, upon whom the burden rests to prove how he was prevented from discovering something he produced using 30-year old evidence, called two witnesses: (1) Dr. Franklin Wright, the author of an affidavit challenging the scientific validity of the Mertz opinion and (2) Atty. Dennis Terez, the federal public defender for the Northern District of Ohio, who authorized the funds to hire Dr. Wright and who explained the complex labyrinth of federal public defender bureaucracy that delayed the presentation of this bitemark evidence from August of 2013 - when the ABFO published one of its apparently many reference manuals - until November 14, 2014 when Hill filed his motion for leave to file a motion for new trial.

The State would note that Hill sought to piggyback other "expert" opinions with his bite mark "evidence" even though no explanation appears in the record why or how he was "unavoidably prevented" from discovering these critiques until November of 2014. While the State disagrees that Hill's "new theory" or "new explanation" of the old evidence does not amount to newly discovered evidence, the visiting judge she found Hill was "unavoidably prevented" from discovering the "new" bite-mark evidence prior to November, 2014, and limited the proceedings exclusively to that evidence.

Hill argues that the lower courts decisions deny him the "opportunity to show the weakness of the case against him as it stands today." Despite Hill's argument at p. 19 of his

petition, Crim. R. 33 is decidedly not a permanently open opportunity to indefinitely re-litigate settled cases so that no decision by any fact finder is ever final. Notably, the grant of a new trial has been referred to as "drastic" measure. *State v. Beaver,* 11th Dist. No. 2011-T-0037, 2012-Ohio-871, ¶49. Crim. R. 33 puts tight reins on the circumstances under which a new trial may be granted. The visiting judge employed well-established legal principles to narrow the scope of the new trial proceedings consistent with the criminal rules.

As will be discussed below, the bite-mark evidence was not "the linchpin" in Hill's case and was not the "only direct evidence" linking Hill to the murder, rape, kidnapping, and arson. Indeed, the State takes issue with Hill's characterization that the court of appeals "heavily relied' upon the bite-mark evidence. As noted above, the courts below found it noteworthy that the bite-mark evidence did **not** appear overly persuasive to previous reviewing courts: "***[T]the Ohio Supreme Court decision affirming Petitioners convictions [State v. Hill, 64 Ohio St. 3d 313, 1992-Ohio-43] only briefly mentioned the bitemark testimony as one of many factors supporting the sufficiency of the totality of the evidence." Hill's Petition, A-2, p. 37. The "Ohio Supreme Court thoroughly reviewed the sufficiency of the evidence in this case when it affirmed the Petitioner's convictions," and the "majority of the Court's findings on sufficiency had nothing to do with the bite mark evidence." *State v. Hill*, 2018-Ohio-4800, ¶ 14.

Thus, Hill's new opinion of thirty-year-old bitemark evidence does not warrant a new trial.

B. The "Newly Discovered Evidence" Is Merely Cumulative to and Merely Impeaches or Contradicts the Former Evidence.

Even when viewed in a light most favorable to Hill, Dr. Wright's proposed testimony, as evidenced through his affidavit (Hill's Petition, A-11) is at best cumulative or impeaching of trial testimony. Dr. Wright, who did not view the victim in the morgue as did Dr. Mertz, now challenges Dr. Mertz's opinion that the plainly visible lacerations to the victim's penis were caused

by human teeth, that the victim's penis was in an erect state when bitten, and that Hill more likely than Combs inflicted those bites. Dr. Wright makes only glancing references to Dr. Levine's opinion that the injuries are, in fact, bite marks. Though Dr. Mertz died in 2005, Dr. Levine is still alive and practicing forensic dentistry. At State's request, he re-reviewed his trial testimony and evidentiary materials and concluded that he would NOT change his testimony if this matter were re-tried.

Contrary to Hill's claim throughout his petition, neither the visiting judge nor the reviewing appellate courts determined that the bite mark comparison was debunked or invalid. While the Court's indicated that the newly discovered evidence may call into question or otherwise impeach or contradict the trial testimony, the science used in this case has not been rendered invalid. As noted above, the new ABFO guidelines that Hill touts as the golden standard, only prohibit identification of a suspect in an 'open population.' Hill's Petition, p .26. In other words, a bite mark found on a victim's body cannot be used to identify an unknown individual as the biter from the general population. The guidelines do not prohibit identification of a biter, in a closed population, as in this case. Here, there were two known individuals involved in a crime, Hill and Combs. A bitemark can be and was matched to Hill, one of the *known* individuals in the crime. Thus, there is nothing in the new guidelines prohibiting such comparison or rendering the comparison invalid.

Hill's assertion at p. 20 of his petition that Dr. Mertz's 30-year old testimony was so faulty that it casts a shadow over the State's entire case is belied by the record. Indeed, the visiting judge clearly explained that the newly discovered bitemark evidence had no relevancy as to whether Hill engaged in anal intercourse with the victim thereby having no effect on the rape count. She then went on to accurately conclude that "the bite mark evidence does nothing to vitiate the sufficiency

of overwhelming evidence against the Petitioner on the Kidnapping specification to the Aggravated Murder count." Hill's Petition, A-2, p. 42.

The visiting judge correctly noting that the record contains "overwhelming" evidence of kidnapping. Indeed, she went into the State's evidence –which would not change on retrial - surrounding the kidnapping and noted that even if Hill's self-serving statements to Warren Police were taken at face value, he "refused to help Fife as he repeatedly attempted to run or crawl away from the attack. He watched over or kept Fife in the secluded wooded area while Combs got the lighter or charcoal fluid. Although Hill denied he ever inflicted any injuries on Fife (who was still alive at the time) when Combs went to Valu-King, passersby heard screams of 'pain' from a 'child' that lasted 20 to 30 seconds during the time Combs was at Valu-King." (Hill's petition A-2).

The visiting judge characterized Hill's story that his only physical contact with Raymond was to turn him over to see if he was still breathing as "incredulous." *Id.* "***[B]y Hill's own admissions he did nothing to help the boy escape, did not seek medical attention for Fife, even when he was alone with him, and never attempted to intervene in the protracted torture of the victim." *Id.*

Even when his blame-shifting statements to Warren Police are viewed in the most defense-friendly light possible, Hill places himself alongside Combs as the child is beaten, raped multiple times, tortured, strangled and set on fire. Hill provided chilling accounts of both external and internal injuries inflicted – he claims –by Combs which are verified by the medical evidence offered by Dr. Adelman. He described choking, battering the child's head against his spinning bicycle pedal, violent yanking on the boy's penis, dousing Raymond in lighter fluid and then setting ablaze his underwear which was secured around the child's neck, and rectally impaling the boy with a "broom handle thing." State's witness Donald Allgood placed Hill at the scene the

night of the crime and witnessed him tossing a "stick" into the brush. With Allgood's help, Warren Police recovered a "broom handle thing" which Dr. Adelman testified matched both blunt and perforating injuries to Raymond's rectum and urinary bladder. Further, Dr. Adelman testified that the cellular structure of the wood grain of the recovered slivers from the "broom handle thing" were similar to foreign plant material discovered in Raymond's internal organs. The visiting judge described this medical evidence and Hill's corroborating statements. (Hill's Memorandum, A-15-16). Hill's own brother testified Hill was washing what appeared to be blood stains out of the gray pants he wore during the assault. While it is true Hill was not connected to this assault with fingerprints or DNA (which was not considered admissible in Ohio courts until 1992; *State v. Pierce*, 64 Ohio St. 3d 490 [1992]), other medical and scientific evidence confirmed Hill's involvement in this case beyond a reasonable doubt.

C. No Probability of a Different Result on Retrial

The fact remains that Hill must show a strong probability of a different result upon retrial. Hill argues a constitutional violation because of the visiting judge's application of the Petro requirement of a "strong probability" of a different result. Hill offers no authority to suggest that any court, in 70 years, has found it unconstitutional to demand that a criminal defendant seeking a new trial based on newly discovered evidence demonstrate at the pleading stage that inclusion of that new evidence evokes a strong probability of a different outcome. Suffice it to say, counsel for the State has failed to locate any authority suggesting the "strong probability" mandate is unconstitutional. Hill may disagree with the courts conclusion, but dissatisfaction does not make it unconstitutional.

Considering his evidence, merely impeaches previous trial testimony, and considering the overwhelming evidence in this case, Hill cannot show that there is any probability much less a

strong one that the outcome would be different. As such, his motion could not meet the *Petro* standards.

Indeed, the Eleventh District Court of Appeals stated:

> "The evidential table indicates the involvement of Hill in the slaying of the victim. Hill's contention suggesting that he merely observed while co-defendant Timothy Combs tortured and assaulted the victim is overwhelmingly negated by his personal odontological 'signature' on the penis of the victim. Again, the record indicates that Hill remained in the field with the victim while Timothy Combs was observed standing on the path. By Hill's own admission, he remained with the victim while Combs procured the lighter fluid. At neither time did Hill seek help for the victim. This mitigating factor is inapplicable in this case."
>
> *State v. Hill*, 1989 WL 142761, *33, aff'd, 64 Ohio St.3d 313, 1992-Ohio-43, 595 N.E.2d 884 (1992).

Obviously, the Eleventh District found it significant that Hill stood guard over Raymond while Combs left the crime scene rather than seeking aid for the badly injured child. See also, *Hill,* 2018-Ohio-4800, ¶77. And while Hill insists that the State's case against him was merely circumstantial, the court below referred to the victim's screams in Combs's absence as "direct evidence" of Hill's involvement in this blood lust. *State v. Hill*, 11th Dist. Trumbull No. 3720, 1989 WL 142761, *30, aff'd, 64 Ohio St.3d 313, 1992-Ohio-43, 595 N.E.2d 884 (1992). The visiting judge likewise referenced the child screaming when Combs left the scene as evidence of Hill's direct involvement in the assault. Hill's Petition, A-2, P.42. Therefore, Hill's argument that he was merely an observer is totally belied by the record.

To conclude, Hill fails to demonstrate that the visiting judge abused her discretion in denying his motion for new trial. The entry clearly details that even without the bitemark evidence, Hill's joint participation in Raymond Fife's murder is supported by the remainder of the evidence. In light of all the other evidence, there is no probability, much less a strong one, that Hill would be acquitted by a three judge panel or a jury with the inclusion of the "newly discovered" evidence

in a new trial.

As such, Hill's petition should be denied.

II. Even if the Bite-Mark evidence was excluded, there is no probability that a new trial result in a different outcome as the evidence of Hill's guilt is overwhelming.

Hill relies on *Jackson v. Virginia*, 443 U.S. 307 (1979) in support of his contention that the State would have insufficient evidence to convict him absent the bite-mark evidence. The State takes issue with Hill's contention that the bite-mark evidence constituted the only direct, uncontradicted evidence of Hill's guilt. Hill's petition, p. 37. This is patently false. Hill completely ignores the multitude of other evidence which established Hill's guilt including his own statements to law enforcement and eye witness testimony. Perhaps most telling, is that the bite-mark was not the cause of death for Hill's 12-year old victim, but was one of the many visible signs of torture inflicted upon Raymond by Hill and his cohort, Combs.

The Ohio Supreme Court rendered the following oft-quoted holding in defining the doctrine of the law of the case: "Briefly, the doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Gohman v. St. Bernard* (1924), 111 Ohio St. 726, 730, 146 N.E. 291, reversed on other grounds; *New York Life Ins. Co. v. Hosbrook* (1935), 130 Ohio St. 101, 196 N.E. 888 [3 O.O. 138]; *Gottfried v. Yocum* (App.1953), 72 Ohio Law Abs. 343, 345, 133 N.E.2d 389. The doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. *Gohman, supra,* 111 Ohio St. at 730-731, 146 N.E. 291. *However, the rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.* See *State, ex rel. Potain, v.*

Mathews (1979), 59 Ohio St.2d 29, 32, 391 N.E.2d 343 [13 O.O.3d 17]." (Emphasis added) *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410, 412–13 (1984).

If *ever* there was a case where a court needed to step in to stem a swelling tide of "endless litigation," this case was it. It strains the imagination to think that any case, even a capital murder case, could have a shelf life of over thirty years, but we have it here. The courts below did not commit error, let alone reversible error, when noting that nearly thirty years ago the Eleventh District Court of Appeals and the Ohio Supreme Court looked to factors *other than teeth marks* to affirm Hill's conviction for rape. Those factors included the force used to commit a variety of sexual assaults, the length of time of the assault, the "egregious force" used pulling on the victim's penis, the use of a sharp and blunt ended implement to impale the victim's rectum, the screams of the victim and Hill's restraint of the victim while his co-defendant left to look for lighter fluid. Hill's memorandum, A-2, p. 41. See also *State v. Hill,* 11th Dist. Trumbull No. 3720, 1989 WL 142761 [Nov. 27, 1989].

The State vehemently disagrees with Hill's assertion that "the admissible evidence is insufficient to sustain his convictions and death sentence." Indeed the visiting judge noted: "*** the Ohio Supreme Court decision affirming Petitioner's convictions only briefly mention the bite mark testimony *as one of the many factors supporting the sufficiency of the totality of the evidence.*" (Emphasis added). Hill's Petition, A-2, p. 37. As the visiting judge correctly noted on the very next page of her opinion, the three-judge panel convicted Hill of three separate death penalty specifications to wit, that he committed the aggravated murder of Raymond Fife during the commission of kidnapping, rape and aggravated arson. She correctly states, "[a] conviction [on] any one of the specifications made Hill eligible to receive a death sentence." Hill's suggestion that there is insufficient evidence in the record to support his conviction is just plain wrong.

As Judge Cosgrove aptly noted, "[t]he relevancy of the bite-mark testimony was a factor in proving whether Hill's mouth came into contact with the victim's penis (oral sex). The bite mark evidence **had no relevance** on the question of whether Hill had anal intercourse with Fife.***More importantly, the bite mark evidence does nothing to vitiate the sufficiency of the **overwhelming evidence** against the Petitioner on the Kidnapping specification to the Aggravated Murder count. The Kidnapping specification provides *a separate and independent basis for imposition of the death penalty in this case*." (Emphasis added). Hill's Petition, A-2, p. 42. Likewise, the bite mark testimony has no relevancy to Hill's conviction upon the aggravated arson specification. The point being, two reviewing courts, including the Ohio Supreme Court, have previously held that Hill's convictions on *two* other aggravating factors are not only supported by sufficient evidence, but they outweigh Hill's mitigating factors beyond a reasonable doubt thereby making him death eligible. The visiting judge correctly concluded that these findings constitute the law of the case to which a lower court must be differential.

Indeed, the Eleventh Appellate District and the Ohio Supreme Court reviewed Hill's convictions and found the evidence to be sufficient to support a conviction. As noted by the courts below, the bite marks were not what killed Raymond and they certainly were not the sole piece of evidence to convict Hill of aggravated murder and several other felonies.

Both Hill and Combs pointed the finger at the other, however, as the courts aptly point out "As an apparent result of the agony of the cumulative torture, the victim was heard screaming continuously, for a period of twenty to thirty seconds, by passersby. At this time, witnesses observed Combs on the path behind Valu-King. Additionally, Hill's own statement indicated he remained with the victim while Combs absented himself from the scene, and that he did not go for help. This direct evidence base provides, at the very least, that Hill was the only other person when

the victim was experiencing the pinnacle of excruciating pain from these egregious assaults." *Hill,* 1989 WL 142761, at *30.

Before leaving this section, the State would like to address Hill's assertion regarding Hill's participation in Raymond's vicious murder. Hill suggests that the State must prove that Hill struck the fatal blows. It is well-settled Ohio law that a defendant can be convicted of aggravated murder under R.C. 2903.01(A) as a principal offender, or as an aider and abettor, pursuant to R.C. 2923.03(A). R.C. 2923.03(F) also provides that Hill could be punished as an aider and abettor as if he were the principal offender. While this Court has found that "that finding, [that Hill is punishable as a principal offender if he is an aider and abettor,] cannot be bootstrapped into a finding that he is the principal offender for purposes of receiving the death penalty under R.C. 2929.04(A)(7)." *State v. Taylor*, 66 Ohio St.3d, 295. 308 (1993). However, in Taylor, there was no evidence that Taylor was the principal.

In the instant case, Hill was charged pursuant to R.C. 2903.01(B), the felony murder section of aggravated murder. He was indicted and convicted of three death penalty specifications pursuant to R.C. 2941.14 and 2929.04(A)(7) which said he purposely caused the death of Raymond Fife while committing kidnapping, rape and arson as the principal offender OR with prior calculation and design.

It is a matter of record the State has consistently argued that both Hill and Combs were principal offenders in Raymond's murder. The Ohio Supreme Court has ruled that there can be multiple principal offenders in a single murder. "We have previously stated that 'principal offender' means the 'actual' killer and not the 'sole' offender. As there can be more than one actual killer, there can thus be more than one principal offender. *State v. Keene* (1998), 81 Ohio St.3d 646, 655, 693 N.E.2d 246, 256." *State v. Stojetz*, 84 Ohio St.3d 452, 1999-Ohio-464, 705 N.E.2d

329 (1999). "*** [W]e have never held that [principal offender] means 'the sole offender.' There can be more than one actual killer—and thus more than one principal offender—in an aggravated murder." *State v. Keene* (1998), 81 Ohio St.3d 646, 655, 693 N.E.2d 246, 256.

Indeed, as the original three-judge panel found in its Opinion of the Court on sentencing: "The Court found little credible evidence as to which co-defendant initiated the series of crimes involved. In any event, whoever may first have taken the victim from the bike before all the events ended, **both participants** have followed a blood lust characterized by a series of acts of torture, rape, and murder to such an extent that the question of who started them was viewed as essentially irrelevant."

The Eleventh District Court of Appeal noted similarly in their initial review of Hill's conviction: "The trial court, in its review of the mitigation evidence, felt that regardless of which defendant first attacked the victim, **both** [Hill] and Timothy Combs engaged in conduct characterized by torture, rape and murder. This court agrees with that assessment. The evidential table indicates the involvement of [Hill] in the slaying of the victim. [Hill]'s contention suggesting that he merely observed while co-defendant Timothy Combs tortured and assaulted the victim is overwhelmingly negated by his personal odontological "signature" on the penis of the victim. Again, the record indicates that [Hill] remained in the field with the victim while Timothy Combs was observed standing on the path. By [Hill]'s own admission, he remained with the victim while Combs procured the lighter fluid. At neither time did [Hill] seek help for the victim. This finding of joint participation was echoed in the visiting judge's decision. Hill's Petition, A-2, p. 13. The Ohio Supreme Court further reviewed and affirmed Hill's conviction and death sentence, stating: "as will be seen in this court's independent review of the defendant's guilt and death sentence, the

conviction rendered by the trial panel was supported by sufficient evidence and the death sentence is both proportionate and appropriate." *Hill*, 64 Ohio St. 3d 313, 334.

The Eleventh District Court of Appeals again noted in its latest judgement: "[t]hat Hill was present during the attack cannot be seriously questioned. The issue is whether his active participation can be inferred from his efforts to conceal his involvement and to place the blame on others. Such an inference is legally permissible and, given the facts of the present case, compelling." (citations omitted) *Hill,* 2018-Ohio-4800, ¶80. The State submits that the evidence is clear, Hill actively participated in these crimes. The trial court noted that passerbys heard screams during the period where Hill and Raymond were alone. Hill's Petition, A-2, p. 42. The trial court further noted that by Hill's own admission, during the attack, he turned his victim over to see if he was still breathing. Hill's Petition, A-2, p. 42.

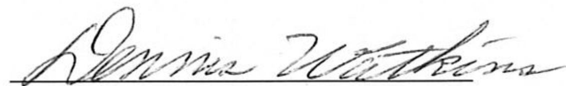
Even if a future fact-finder found more credibility in Dr. Wright's conclusions over Doctors Mertz's and Levine's conclusions, the record is awash in ample evidence to still convict Hill as a principal offender. That evidence has been previously stated elsewhere in this brief. For these reasons, even absent the bite-mark evidence, the evidence of Hill's guilt was overwhelming and more-than-sufficient to convict him of the charges and sentence him to the death penalty.

CONCLUSION

Hill's Motion for New Trial, filed nearly three decades after his conviction, was properly denied by the state trial court. No constitutional violation has occurred. In fact, what Hill seeks here would trigger bad precedent, suggesting that at any time, even decades later, any party could reopen a case that has long been closed simply by presenting a "new" opinion or theory. In that case, no criminal conviction would ever be "final" as evidence would be "open for interpretation" months, years, decades, even eon's later. To what end?

"Finality requires that there be some end to every lawsuit, thus producing certainty in the law and public confidence in the system's ability to resolve disputes.***" *Knapp v. Knapp*, 24 Ohio St. 3d 141, 144–45, 493 N.E.2d 1353, 1356 (1986). For 33-years this case has languished in the judicial system. Hill's newly produced evidence does not change the facts of this case which establish that Hill and his codefendant, Timothy Combs, brutally attacked, raped, tortured, burned, and ultimately killed a twelve-year-old boy, Raymond Fife. Thus, the state courts did not err by denying Hill's woefully belated motion for new trial. The State of Ohio submits Hill fails to submit any compelling reason to merit review by this Court as required by U.S. Supreme Court Rule 10. As such, the State of Ohio requests that this Court **DENY** Hill's petition for certiorari.

Respectfully submitted,



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STATE OF OHIO

PROOF OF SERVICE

I do hereby certify that a copy of the foregoing Brief in Opposition was sent by ordinary U.S. Mail to Vicki Werneke (Ohio Atty. Reg. #0088560), Assistant Federal Public Defender, Capital Habeas Unit, 1660 West 2nd Street, Suite 750, Cleveland, Ohio 44113 on this 3rd day of December, 2019.

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