

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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DOUGLAS PRADE,

*Petitioner,*

v.

STATE OF OHIO,

*Respondent.*

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**On Petition for Writ of Certiorari to  
the Supreme Court of Ohio**

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**APPLICATION FOR EXTENSION OF TIME  
TO FILE A PETITION FOR WRIT OF CERTIORARI**

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## APPLICATION

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, and 28 U.S.C. § 2101(d), Applicant Douglas Prade respectfully requests a 60-day extension of time, to and including August 19, 2019, to file a petition for a writ of certiorari to review the decision below.

1. The Supreme Court of Ohio ruled below on March 20, 2019. *Ohio v. Prade*, 2019-Ohio-944, 119 N.E.3d 434 (Ohio 2019) (Appendix A). Currently, a petition for certiorari is due on June 18, 2019. This application is being filed over ten days before the petition is due. *See* Sup. Ct. R. 13.5. The jurisdiction of the Court would be invoked under 28 U.S.C. § 1257(a).

2. This case presents an important issue relating to the burden of proof when a criminal defendant seeks a new trial based on newly discovered evidence. In Ohio, a criminal defendant seeking a new trial based on newly discovered evidence must demonstrate a “strong probability” of a different result. *See, e.g., Ohio v. LeMar*, 95 Ohio St. 3d 181, 202, 2002-Ohio-181, ¶ 85, 767 N.E.2d 166, 196 (Ohio 2002). This burden is “one of clear and convincing evidence.” *State v. Ayers*, 185 Ohio App. 3d 168, 174, 2009-Ohio-6096, ¶ 21, 923 N.E.2d 654, 658 (Ohio Ct. App. 8th Dist. 2009). No other jurisdiction—federal or state—applies a burden of proof in this context higher than a preponderance. *See, e.g., 3 C.A. Wright et al., Fed. Prac. & Proc.: Crim.* § 584 (4th ed. Thomson Reuters 2018). In his petition for

a writ of certiorari, Mr. Prade intends to challenge Ohio's burden of proof as a denial of Due Process.

3. In the proceedings below, Ohio's unique, heightened burden of proof was central to the wrongful denial of former Akron Police Captain Douglas Prade's new trial motion. In 1998, Mr. Prade was convicted of murdering his ex-wife based in substantial part on the prosecution's forensic dentists' expert testimony tying Mr. Prade's dentition to a bite mark on the victim's arm. At that time, DNA testing technology could not detect DNA over the killer's bite mark, so no meaningful DNA evidence was introduced at trial.

4. Since Mr. Prade's trial, DNA testing technology has advanced, and new DNA tests performed in 2012 found male DNA over the killer's bite mark from which Mr. Prade was definitively excluded. Separately, scientific studies relating to the reliability of forensic dentists' opinions tying human dentition to bite marks have shown those opinions to be highly unreliable, and current professional standards in that field bar the opinions given at Mr. Prade's trial.

5. In 2012, the trial court considered this new evidence and found Mr. Prade actually innocent and, in the alternative, granted his motion for a new trial. 1/29/13 Order. Mr. Prade was unconditionally released from prison and was free from January 2013 until July 2014 when his exoneration was reversed, at which time he voluntarily appeared and was reincarcerated. *State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072 (Ohio Ct. App. 9th Dist. 2014), *app. not allowed*, 2014-Ohio-3195, 12 N.E.3d 1229 (Ohio 2014). Mr. Prade challenged the State's right to appeal

his exoneration in a writ that was denied, but prompted the observation that there is “no doubt that this case needs to go to a new jury.” *State ex rel. Prade v. Ninth Dist. Ct. App.*, 151 Ohio St. 3d 252, 259, 2017-Ohio-7651, ¶ 31, 32, 87 N.E.3d 1239, 1245 (Ohio 2017) (O’Neill, J., dissenting).

6. After remand, the State moved to appeal the new trial order, and the intermediate appellate court, acting *sua sponte*, found that the no-longer-contingent new trial order was not final and, thus, allowed the trial court judge who succeeded the prior trial court judge upon her retirement to reconsider the new trial motion. 8/14/14 Journal Entry (Ohio Ct. App. 9th Dist.), *app. not accepted*, 142 Ohio St. 3d 1449, 2015-Ohio-1591, 29 N.E.3d 1004 (Ohio 2015). The new trial court judge denied the new trial motion, and the intermediate appellate court affirmed. 3/11/16 Order (C.P. Summit Cty.), *aff’d*, 2018-Ohio-3551, 107 N.E.3d 1268 (Ohio Ct. App. 9th Dist. 2018) (Appendix B). Mr. Prade sought discretionary review because Ohio’s elevated burden of proof in this context violates the Due Process Clause, but The Supreme Court of Ohio, with two of six Justices dissenting, declined to hear an appeal on March 20, 2019. 2019-Ohio-944, 119 N.E.3d 434 (Appendix A).

7. Mr. Prade requests an extension so that his counsel, David Alden of the Jones Day law firm, has sufficient time to file a petition for a writ of certiorari. Mr. Alden and Jones Day have been representing Mr. Prade in post-conviction proceedings on a *pro bono* basis for over a decade and, with the Ohio Innocence Project, were lead counsel for Mr. Prade in the post-conviction proceedings described above. Before the time to file a petition for certiorari expires on June 18,

2019, Mr. Alden is taking two plaintiffs' depositions (*Waters v. R.J. Reynolds Tobacco Co.*, No. 1784-CV-02721 (Super. Ct., Suffolk County, Mass.) and *Donaldson v. R.J. Reynolds Tobacco Co.*, No. 2008-CA-15000 (Cir. Ct., Duval County, Fla.)) and is preparing a corporate representative for and defending a Mass. R. Civ. P. 30(b)(6) deposition (*Fuller v. R.J. Reynolds Tobacco Co.*, No. 1672-CV-154 (Super. Ct., Barnstable County, Mass.)). Accordingly, Mr. Prade respectfully requests that an order be entered extending the time to file a petition for certiorari to and including August 19, 2019.

Respectfully submitted,

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