DOCKET NO. 127241
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Leave to Appeal
	)	from the Appellate Court
	)	of Illinois
Appellant,	)	Fifth Judicial District,
	)	No. 5-20-0074
	)	
v.	)	There on Appeal from the Circuit
	)	Court of Third Judicial Circuit,
JOHN PRANTE,	)	Madison County, No. 82 CF 381
	)	
Appellee.	)	Honorable Neil T. Schroeder
	)	Judge Presiding.

BRIEF OF APPELLEE, CROSS RELIEF REQUESTED

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ISSUES PRESENTED FOR REVIEW

1. Do Prante's affidavits and evidence demonstrating the repudiation of the bitemark[1] evidence introduced by the State at his 1983 trial establish a *prima facie* case of cause-and-prejudice of a due process violation?
2. Do Prante's affidavits and evidence establish a colorable claim to allow him leave to file a successive post-conviction petition raising an actual innocence claim?

[1] The term "bitemark" is alternatively spelled "bite mark" and "bitemark" in the record. Prante uses the latter unless the term is spelled otherwise in a direct quote.

INTRODUCTION AND NATURE OF DISPUTED ISSUES CURRENTLY BEFORE THIS COURT

On October 15, 2018, John Prante sought leave to file a successive post-conviction petition. C. 2637. The overwhelming crux of the new evidence and argument supporting Prante's motion surrounded the repudiation of the bitemark evidence relied upon by the State during its yearslong investigation of the 1978 murder of Karla Brown and the subsequent 1983 conviction of Prante. C. 2637-2712. Through affidavits and the reports from blue ribbon forensic panels, Prante's petition plainly pled that the "current scientific community recognizes a lack of consensus on whether forensic dentists have the ability to reliably identify injuries as human bite marks" at all, and there would be no basis to do so in this case given the "poor quality evidence" (black-and-white, unscaled photographs purporting to show a bitemark on skin—a particularly poor medium for registering a bitemark). *People v. Prante*, 2021 IL App (5th) 200074, ¶¶ 51-54.

The Circuit Court determined that Prante's proffered evidence was insufficient to allow him leave to file actual innocence or due process claims. C. 3163-66. The Fifth District affirmed the actual innocence finding but reversed the due process finding. As to the latter, the Fifth District held that Prante established a *prima facie* case of cause and prejudice that his due process rights were violated by the State's use of faulty and unreliable bitemark evidence to obtain his conviction. *Prante*, 2021 IL App (5th) 200074, ¶¶ 62, 78-87. This Court allowed the State's petition for leave to appeal.

In its opening brief in this Court, the State correctly concedes several relevant issues pertaining to the cause-and-prejudice analysis on the due process claim:

(1) The State agrees Prante's successive post-conviction filings established cause. St. Br. at 25 ("Defendant seeks to raise in a successive postconviction petition a due

process challenge to the bitemark evidence presented at trial. . . . Defendant **has shown cause** for not raising this claim in an earlier proceeding because the scientific evidence submitted in support of his claim did not exist at the time of trial or when he filed his initial postconviction petition.") (Bold added.)

(2) The State also agrees that the admission at trial of unreliable expert testimony *may be* a due process violation. St. Br. at 26 (quoting *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012)) (State explaining that "the constitutional right to due process **may be violated** 'when evidence is so extremely unfair that its admission violates fundamental conceptions of justice.'") (Bold added). *See also id* (quoting *Han Tak Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012), and *Giminez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016)) (State explaining that "[s]everal courts have thus held (**and the People do not contest**) that the presentation of expert testimony that was considered reliable at the time of trial but is later discredited violates due process if the testimony 'undermined the fundamental fairness of the entire trial.'" (Bold added.)

(3) As it relates to the *possible* due process violation of the trial admission of unreliable expert testimony as described immediately above, the State further agrees that this category of unreliable evidence may include bitemark evidence. St. Br. at 26 (citing and quoting *Ege v. Yukins*, 485 F.3d 364, 375 (6th Cir. 2007), for the proposition that "the admission of unreliable expert testimony (there, bitemark evidence) 'constitutes a denial of fundamental fairness [when] the evidence is . . . a crucial, critical[,] highly significant factor" in the conviction").

(4) Finally, in deference to the procedural posture and controlling law that well-pled allegations at this stage are taken as true, the State does not contest the factual allegations at the heart of Prante's successive petition that the State's bitemark evidence presented at trial has been repudiated: "[T]he **People assume for purposes of this appeal that the bitemark evidence presented at trial has now been discredited and deemed unreliable by the scientific community."** St. Br. at 25. (Bold added.)

With these statements from the State's brief in mind, at least as it pertains to the due process issue, the sole disputed issue in this Court is whether Prante has established a *prime facie* case that he was prejudiced by the State's introduction of the acknowledged scientifically discredited and unreliable bitemark evidence used to support Prante's arrest and conviction. *See People v. Bailey*, 2017 IL 121450, ¶ 24 (explaining that at the leave to file stage, the Petitioner need only show a *prima facie* case of cause-and-prejudice). Accordingly, Prante's presentation of facts and arguments that follow focus on the role bitemark evidence played in his arrest and conviction.

Ultimately, this Court easily should find that this universally discredited and grossly unreliable technique was infused into every stage of this investigation and trial, and certainly demonstrates a preliminary showing that Prante's due process rights were violated. The evidence also shows that Prante is likely yet another of the already-identified 30 innocent men and women wrongfully convicted through bitemark evidence. Prante should be granted leave to file both due process and actual innocence claims.

STATEMENT OF FACTS

A. The Four-Year Karla Brown Murder Investigation

i. The Initial Investigation

Karla Brown and her boyfriend, Mark Fair, moved into a new home at 979 Acton, Wood River, Illinois, on or around June 20, 1978. R. 1138; *People v. Prante*, 147 Ill. App. 3d 1039, 1041 (5th Dist. 1986). Paul Main, a friend of John Prante, occupied the home next door at 989 Acton. *Id.* at 1042. During the evening of Tuesday, June 20, 1978, Fair and Brown spent time with friends before the friends departed for the evening. R. 1140.

At approximately 7:45 a.m. the next morning, June 21, 1978, Fair left for work, leaving Brown alone in their new home. R. 1141. The house was in order when he left. R.1141-1142. Brown spoke to friends on the phone at 9:30 a.m. and 10 a.m. and to Fair's mother, Helen Fair, between 10 a.m. and 11 a.m. *Prante,* 147 Ill. App. 3d at 1042-43. The discussion was interrupted when Brown said she would call Helen Fair back because someone was at the door. *Id.* at 1043. This was the last known time anyone spoke to or saw Brown alive. Phone calls to Brown's home later that day went unanswered, and when a friend stopped by Brown's home sometime after 11:00 a.m., no one answered the door even though Brown's van was parked out front. *Id.*

At approximately 5:30 p.m., Mark Fair and his friend, Thomas Feigenbaum, arrived back at the home where they discovered Brown's body in the basement laundry room. Her head and shoulders were immersed in water in a large metal lard can. *Id*. at 1041-42. Her hands were tied behind her back with a white extension cord, and her body was bent over the barrel at the waist. *Id.* at 1042. Brown was wearing a heavy sweater

that she never wore during the summer months; the sweater was buttoned at the top. Two men's socks were tied around her neck. *Id.* The socks belonged to Mark Fair and had been kept in a dresser drawer in the bedroom upstairs. *Id*.

Pathologist Harry Parks conducted the autopsy shortly after the body was discovered and concluded that Brown died via strangulation and that she had facial injuries resulting from a blunt object. R. 1247-1249. Dr. Parks did not note any supposed bitemarks on the body. C. 1146-47. The initial hospital report where Brown was examined as an alleged rape victim did not note bitemarks either. C. 1154-55. Neither evidence technicians, the responding officers, nor anyone else indicated that there was a bitemark on Brown's body. R. 773, 885, 1253; C. 2761. And over the next several years, no one ever reported to the police that they observed a bitemark on the victim's body.

During the initial stages of the investigation, the police spoke to John Prante and Paul Main. Prante and Main confirmed they were hanging out on Main's porch the night before the murder and saw Brown, Fair, and others moving their belongings into the house. C. 1061, 1074, 1307-08. It is generally undisputed that Prante came back the next morning before leaving for some time to apply for a series of jobs, which was corroborated by employment records. C. 1307-08; R. 1216-23. Neither Prante nor Main reported anything about bitemarks. No friend or acquaintance of Prante ever reported that Prante said anything about bitemarks or anything unusual at all to them relating to Brown in the days and weeks following the murder.

ii. <u>The 1980 Investigation</u>

In the summer of 1980, crime scene technician Alva Busch attended a lecture given by Homer Campbell, R. 1214-1215, a forensic dentist now tied to at least three

wrongful convictions and one wrongful indictment. C. 3043, 3047, 3056 (identifying Campbell's ties to the cases of Calvin Washington, Joe Sidney Williams, Steven Mark Chaney, and Dane Collins). Busch learned about the use of "image enhancement to help identify instruments that had made wounds and also in the process of identifying bite marks." R. 1215. Shortly thereafter, law enforcement investigators sent Campbell the crime scene photos. R. 1229. Campbell received and reviewed black and white photographs of the victim's body taken at the crime scene and autopsy and identified a purported bitemark on the victim's right collarbone. R. 1547-1549. Campbell so concluded even though Brown's right collarbone was seemingly submerged in water for hours by the time her body was found.

iii. The 1982 Investigation

Nearly two years later, in March 1982, local investigators drove to the FBI Academy in Washington, D.C. to consult with a criminal profiler. After this meeting, the State's investigation zeroed in on John Prante, and he was put under constant surveillance by local law enforcement in the small town. C. 247 (Prosecutor Weber explaining that Prante was under 24-hour surveillance for two weeks prior to his arrest). Prosecutor Weber then executed a plan to exhume Brown's body near the fourth anniversary of her death accompanied by a high-profile media campaign that would leak the supposed bitemark evidence to the public for the first time and exude confidence that investigators were nearing an arrest. *See e.gs.*, C. 237 (local newspaper article quoting Weber as saying: "Bite marks are as good as fingerprints. There definitely was a bite mark on Karla Brown. That's what we're going after. If it still can be used after four years, it will tell us who killed her."); C. 241, R. 1990 ("A bite mark on Karla L.

Brown's neck is the key evidence that should lead to identification of the man who strangled her in Wood River four years ago, according to Madison County State's Attorney Don W. Weber," read a stipulation at trial from a May 25, 1982 article in the St. Louis Globe-Democrat); R. 1991 (trial stipulation from May 20, 1982 Alton Telegraph where Prosecutor Weber purportedly described the investigation as "concentrating on one suspect" and quoting Weber as saying "we have got one guy that we are going to look at before we look at anyone else"); C. 263 (Weber explaining that the body would be exhumed to "obtain photographs of a bite mark left on her lower neck by the killer," which is like a fingerprint and "'[i]f all goes well, it will lead to a conviction."); C. 264 ("Madison County State's Attorney Don Weber said investigators are looking for evidence of bite marks near the collar bone of Brown's body. That evidence could lead authorities to her killer, Weber said.").

In the weeks after the media blitz and the 24-hour surveillance on Prante, in June 1982, a group of Prante's friends or acquaintances from years prior came forward for the first time claiming that Prante acted unusually in the days after the murder or made comments about a bitemark on Brown in 1978—years before law enforcement even discovered the purported bitemark. For example, John Scroggins belatedly claimed Prante leered and made obscene comments about Brown to Scroggins and Main the night before. Scroggins spoke to the police a week after the murder—and confirmed he, Main, and Prante did see Brown outside her home moving in—yet made no mention of Prante making these inappropriate statements. C. 1345; R. 1173-74. Harold Pollard, who entered drug treatment therapy six months after his 1982 police statements, R. 1986, also belatedly claimed that Prante made crude sexual comments about Brown and told

Pollard that he saw the victim's body curled up on the floor of the basement, even though Pollard never mentioned it to police at the time of the crime four years earlier. R. 1481-86. And after Prante's June 8, 1982 arrest, a woman named Susan Lutz insisted that she had a series of sexual encounters with Prante, a couple of which involved Prante biting her on the neck and another where Prante whispered in his ear that he had killed a woman. R. 1472-73.

Most significant to the subsequent prosecution, Vickie White claimed that four years prior, in the presence of her husband Mark White and Roxanne and Spencer Bond, Prante said he saw teeth marks on the victim's shoulder (and gestured to his shoulder) while her body was curled up in Brown's basement. Mark supposedly remembered the gesture, R. 1304-06, but nothing else. Roxanne confirmed none of it. R. 1299-1302.

However, Spencer Bond, who admitted some animosity toward Prante based on his belief that Prante once made a pass at his wife Roxanne years prior, R. 1412, generally confirmed Vickie's new memory—although they (and Mark White) all differed on the day it occurred. R. 1290, 1304, 1321-22. But in 1982, despite never alerting anyone of this information previously, Bond insisted that Prante told him that he had been at Brown's house around 2:00-3:00 p.m. during the afternoon of her death and "was supposed to go back and see her because he might have a possible date with her." R. 1313. According to Bond, Prante then said that Brown was in a "curled position stuck in a pail of water down in the basement," and Prante gestured toward his left shoulder while claiming Brown had been bitten there. R. 1313-1315.

With this reported information, Bond quickly became a law enforcement partner in their investigation. At their request, Bond surreptitiously recorded two conversations

with Prante and one with Main in an effort to generate evidence against what was now the only real suspect—Prante. In an affidavit in support of the eavesdropping application for Bond, Agent Randall Rushing swore under oath that the request was supported by human bitemarks identified by two forensic odontologists from photographs of the victim, and Prante's statements describing the state of Brown's body in 1978 to Bond and others. C. 797-98.

During the subsequent recorded conversations, Bond relentlessly confronted Prante (and Main) with his four-year-old memories of Prante's statements regarding the bitemark and directly accused Prante of the murder or at least knowledge thereof. C. 107-68 (Main eavesdrop); C. 800-26 (6/2/82 Prante eavesdrop) C. 978-1010 (6/4/82 Prante eavesdrop). Prante (and Main) repeatedly denied it, and Prante adamantly maintained his innocence throughout all of the lengthy recorded statements. *See e.g.*, C. 986 (Prante stating, on transcribed June 4, 1982 recording with Bond, that Bond could ask him whatever questions he wants "[c]ause I'm not guilty of anything. . . . No I don't remember the bite marks, cause I'm sure I didn't tell you nothin about it, because I'm sure I didn't know nothin about it.").

After the second recording, Prante began to suspect that Bond was working with the police, R. 1389, and understood that he (Prante) appeared to be a target of the investigation. In response, Prante sought to clear his name, and called Prosecutor Weber himself to address any concerns he had. Weber insisted Prante was not the primary suspect. R. 1410. Prante also voluntarily provided his dental impressions to the police. R. 1388. These impressions—and their subsequent comparison and purported consistency to the image on black-and-white unscaled photos—were the subject of

lengthy expert testimony from Drs. Campbell and Lowell Levine in the State's case-in-chief at the trial.

B. The Role of Bitemarks in Prante's June 8, 1982 Arrest

"The bite marks were the key factor in arresting Prante in connection with the crime," according to an article in the record that recounted in detail an interview with Wood River Chief of Police Donald Greer, who testified at the trial. C. 257. In a different article on June 10, 1982 in the Alton Telegraph detailing a press conference related to the arrest, Prosecutor Weber explained that "the examination of a bite mark in the area of Miss Brown's right collarbone was helpful" in linking Prante to the crime. C. 247. Shortly after the arrest, Weber praised and protected Alva Busch (who was the subject of an internal Illinois Department of Law Enforcement investigation) as giving local investigators "the first real break in the case" by suggesting image enhancement that led to sophisticated analysis of photos of bitemarks that subsequently led to Prante's arrest. C. 259. And in yet another article related to Prante's arrest, "a source close to the investigation" explained that "the bite mark, Prante's statements to Bond and observations by Paul E. Main, a friend of Prante's who lived next door to Miss Brown, apparently form the nucleus of the prosecution's case." C. 265.

On the same day as Prante's arrest, State Investigator Tom O'Connor executed an affidavit in support of a search warrant of Prante's home. C. 468-474. In detailing the evidence against Prante in support of the warrant application, Agent O'Connor described Campbell's 1980 discovery of the bitemarks, Spencer Bond's statement claiming Prante told him about the teeth marks in 1978 (before police knew), Dr. Mary Case's exhumation of the body confirming bitemarks, and Dr. Lowell Levine's analysis of

Prante's dental impressions to the photograph of the purported bitemarks and conclusion that they were consistent. C. 473-74. As noted, both Campbell and Levine testified for the State at trial, and like Campbell, Levine's bitemark analysis has been tied to wrongful convictions and indictments. C. 3040, 3052, 3056 (identifying Levine's role in the Keith Harward and Edmund Burke cases).

C. The Role of Bitemarks at Prante's Trial and the Prosecution's View of its Import.

The transcripts of pre-trial proceedings through the court's December 8, 1983 appointment of the public defender for appeal following denial of a motion for new trial account for all but 45 pages of the 2,315 pages in the report of proceedings of this record. A computerized Optical Character Recognition (OCR) of this record reveals that the phrase "bite mark" appears 554 times. The word "bite" alone reveals 717 entries in the report of proceedings.

i. Voir Dire

The court allowed the parties to conduct *voir dire*, and Prosecutor Weber asked every single *venire* member (in the presence of the entire *venire*) about their knowledge of "bite mark technology." R. 173-729. Prosecutor Weber repeatedly framed those questions as an undisputed fact that bitemark "technology" was valid and reliable evidence, and that bitemarks were found on the deceased victim. *See e.g.*, R. 178 ("There's going to be evidence in this case concerning some bitemarks that were found on her collarbone."). Weber repeatedly summarized the bitemark technology: "That's basically where someone bites somebody or something, and someone can say, well, I know who did it because I can see his teeth match up." R. 197. At other times he explained it as follows: "experts are trained" and they can make judgments if it is a

"human bite. And if it's a human bite, sometimes they can carry it further and they can say it is not these five people. And sometimes they can carry it even further and say not only is it not these people, but it is this person." R. 208. *See also* R. 267 ("And sometimes you can even go further and say it's a man and this is the man. That's what bite mark technology is."); R. 290 ("Sometimes you can exclude people. And then sometimes you can say this guy made this bite mark."). R. 345 ("[S]ometimes you can go all the way and say these people didn't do it, and this guy did."); R. 716 ("And bite marks sometimes match – sometimes when people bite certain things, they match teeth prints. And if you get their teeth, you can sometimes match them up."). Today, it is understood that each of these claims made by the prosecutor about the capabilities of bitemark evidence are scientifically indefensible, including the claim that experts are capable of reliably diagnosing an injury as a human bitemark. C. 2720-46, 2930-3058.

ii. Opening Statements

The State gave an extensive opening statement. (The Defendant reserved. R. 801.) Near the outset, Prosecutor Weber told the jury as follows:

> You have to remember that this case is going to be judged by the totality of the evidence, and even though that there will be some very damaging evidence showing that Mr. Prante is guilty some – some irrefutable facts in accordance with the evidence will show that three days after the killing that person right in that chair was talking about bite marks on the shoulder of the victim. The evidence will be that the police didn't know about the bite marks; that the pathologist who did the autopsy didn't know about the bite marks, and that in fact it wasn't until two years later that the law enforcement community learned that there were bite marks on the body of this victim, a fact that I don't think even will be disputed by the defense testimony. There will be other evidence indicating Mr. Prante's guilt, but **that piece of evidence alone should be keyed in on I think by this jury.**

R. 753-54 (Bold added). Over the course of the next twenty pages, the prosecutor continued to focus on how at the initial stages of the investigation, no one discovered a

bitemark, R. 755-73, and he instructed the jury to contrast that with Prante who was "telling three different people that the body had bitemarks on the shoulder, a fact not known to the police until two years later, and I think you'll have to draw the obvious conclusion at that point." R. 774.

Prosecutor Weber then described the first two "big breaks" in the case, which revolved around Alva Busch learning about Dr. Campbell's photographic enhancement techniques and then Campbell himself identifying the bitemarks on the victim's body. R. 774-75. This was followed by the next "big break" described by Weber, which was in 1982 after the "high profile" campaign surrounding the victim's exhumation and witnesses subsequently coming forward with information. R. 776-77. Weber then detailed what Vickie White, Mark White, and the "real common man hero in this case, Spencer Bond" said about Prante describing and gesturing about bitemarks on Brown's shoulder in 1978. R. 778-87.

The prosecution then turned to describe to the jury the "final phase" of the case, which Weber described as "the actual bite mark testimony." R. 788- 92. Weber tells the jury this testimony, which comes from Drs. Levine and Campbell, will not be "vital" in and of itself "except for the fact that there *were* bite marks, however, the experts will go considerably further than saying that." R. 792 (italics added). Prosecutor Weber than spends roughly five pages of transcript describing how the second autopsy from Dr. Case confirmed the bitemarks, R. 794, followed by detailing the expected testimony of the forensic odontologists who identified the human bitemarks and found that, of the people whose dentition were examined, the bitemarks were consistent only with Prante. R. 796-97.

Weber concluded his opening statement by focusing on several "keys to the case."[2] The very first one was: "John Prante knew about the bite marks in June of 1978, two years before the police, four years before the exhumation." R. 798. Weber explained that there will not even be a debate amongst the experts that these are "human bite marks." *Id.* Another one of the "keys" to the case, according to the prosecutor, were that "Prante's teeth are consistent with the killer, and you have to consider that in light of all the evidence. Maybe somebody in Spokane, Washington, or London, England, has got teeth like John Prante. That guy wasn't sitting next door." R. 800.

iii. The State's Case-in-Chief

The State's presentation of trial evidence primarily proceeded by chronologically documenting the four-year investigation. At the outset, the prosecution elicited from both law enforcement and civilian witnesses alike that they did not observe a bitemark on the body when processing the scene. *See e.gs.*, R. 885, 979, 1002, 1009, 1018, 1028 (eliciting from responding officers William Redfern, Alva Busch, Sgt. Richard Morris, Chief Ralph Skinner, as well as the coroner and the forensic serologist that they did not observe bitemarks); R. 1155-56, 1164-65 (eliciting from the victim's husband Mark Fair and his friend Tom Fiegenbaum—the two individuals who discovered the body—that they did not observe bitemarks and framing the question to Fiegenbaum as an assumption the bitemarks existed—Q: "When is the first time you ever had any idea that there were any bite marks on the body that you saw? A: When it – When it came out in the paper when they exhumed the body.").

[2] Weber tells the jury there are "eleven," but he only actually goes on to list four of them, at least two of which plainly concern the bitemarks and arguably so does a third.

The State then turned to the 1980 investigation, recalling evidence technician Alva Busch and calling Wood River Chief of Police Melbourne Gorris to talk about the image enhancement technology and the process of discovering the purported bitemarks. R. 1215; *see also* R. 1231 (eliciting from Gorris that the first time he "found out or knew anything or had any inkling about bite marks" was during consultations with Campbell in 1980).

The remainder of the State's presentation of evidence focused on the 1982 re-investigation and the arrest of Prante. A law enforcement agent testified that after the meeting with a criminal profiler, the investigative focus seemingly changed from Paul Main to Prante. R. 1237. The pathologist, Dr. Parks, testified that although he didn't recognize the bitemark in 1978, by 1982 he had learned more: He examined State Exhibit 3-88 (the relevant photo) and testified "it is consistent with a human bite mark."[3] R. 1253. *See also* R. 1254 ("From that picture that you showed me I would say there were bite marks."); R. 1256 (State elicits from Dr. Parks that the photos show "they are not artifacts. They are actual bite marks.").

Additionally, as described earlier, the State called Scroggins, Vickie and Mark White, Roxanne and Spencer Bond, Susan Lutz, and Harold Pollard all to testify about statements or actions Prante supposedly made or took—mostly relating to bitemarks or other observations about the victim's body. R. 1167-1200; 1287-1328; 1401-19, R. 1477-87. None of them reported any of these allegations about Prante's statements or

[3] In a sidebar discussing the admissibility of this and other photographs of the purported bitemark, the trial judge referred to them as "[t]he famous bite mark photos." R. 879. In urging admission, the State called the photos "crucial. This is the picture in this case." R. 879.

actions—even ones that had nothing to do with bitemarks—when they spoke to the police in the initial stages of the investigation.

The State then elicited testimony relating the recovery of Prante's dental impressions, R. 1386, and then, of course, the comparisons of Prante's impressions, Main's impressions, and a third person to the black-and-white, unscaled photograph. The testimony related to the bitemarks directly came from Dr. Parks (as described above), Dr. Case (who conducted the autopsy after exhumation and who testified that the bitemarks occurred shortly before she died, R. 1530-32), Michael Melton (a photography expert who identified photos and identified the bitemark, R. 1596), Dr. Warren Waters (who took Prante's impressions in June 1982 and alleged that his teeth were "very distinctive," R. 1432-33), and Drs. Campbell and Levine.

Dr. Campbell testified that the photographs show at least three bites. R. 1562. He claimed skin is an excellent medium for bitemarks, R. 1581—which we now know is untrue—and that Prante's teeth were consistent with the bitemarks (and no one else he compared were). R. 1566. Campbell explained, accurately, that bitemark identification was garnering wide acceptance: "By talking to people in the field, bite marks are being recognized more and more every year, and the pathologists are becoming much more aware of bite marks, what they look like, and are starting to treat them and to gather the evidence which many times before this was just totally overlooked or unrecognized, so every year we have seen an increase." R. 1584.

Dr. Levine said essentially the same thing: He claimed that bitemarks are no different than fingerprints, R. 1617—once again, a claim we now know is untrue—that there are absolutely bitemarks in the photo, R. 1619, skin is an excellent medium, R.

1633, and that every person he examined was excluded except Prante, whose teeth were consistent. R. 1619-25. The State buttressed this testimony by calling Prante's own dentist, Ronald Mullen, who testified that he sees 6,000-7,000 patients a year and the spacing in Prante's teeth is very unique—less than one percent of his patients have teeth like that. R. 1641.

Beyond the bitemarks, the remainder of the State's case revolved around alleged inconsistencies Prante made over the four-year period about his whereabouts on the day of the murder and the night before. The State compared and contrasted statements Prante made to the police in the days and weeks following the murder with statements he made to the prosecutor, the officer who took him to get his teeth sample, the officers who arrested him, the lengthy surreptitiously recorded statements to Bond, and statements to Main or his family members. *See e.g.*, R. 2055 (State closing argument maintaining that Prante intentionally misstated things because he is guilty and a liar). Generally speaking, there is no question Prante struggled to remember or give consistent accounts of his whereabouts during the many times he was asked or confronted about it. His own testimony at trial, where he claimed the memories "came together in this last year," C. 2396, provided more attempts to construct an accurate memory of his whereabouts at specific times on a specific day five years prior—one of many faulty premises active in this case related to humans' ability to recall that is reinforced by memory expert Dr. Nancy Franklin. C. 2470-80. Ultimately, whether surreptitiously recorded or voluntarily reported, Prante always maintained his innocence, never once suggesting he was involved in the crime.

iv. Defense Presentation of Evidence

The defense called a series of witnesses to testify to Prante's good character. R. 1682-30. His counsel attempted to present evidence that a different man, Joseph Millazo, confessed to the crime, R. 1671-81, which the State rebutted by presenting evidence that Millazo's teeth were excluded, including by recalling Dr. Campbell in rebuttal. In that testimony, Campbell reinforced, in no uncertain terms, that there were "absolutely human bite marks" on the victim, and Prante is the only individual compared whose teeth were consistent. R. 2022.

Prante presented three experts to attempt to refute the conclusions of the State's bitemark evidence. Pediatric dentist Donald Eugene Ore, qualified as an expert in photography, testified that the black-and-white photo used by the State's experts both for identification of the injury as a bitemark and in making the comparison was flawed. The photo had no reference to scale and the enlargement may have caused distortion. R. 1743-1745. Similarly, forensic odontologists Edward J. Pavlik[4] and Norman Sperber both testified that, given the black-and-white photograph, the angle of the photograph, and the lack of scale and possible distortion in the photo, they had no idea whether the marks on Brown's neck were bitemarks at all and so could not make reliable comparisons to standards. *Prante*, 147 Ill. App. 3d at 1055. Pavlik and Sperber also expressed concern that pulling at the victim's skin could have distorted the injury, explaining that the fact that the mark was in a straight line made it less likely to be a bitemark. *Prante*, 147 Ill. App. 3d at 1055. When pressed on cross-examination to assume the mark at issue was a bitemark, however, they did not dispute that Prante

[4] Dr. Pavlik's surname is misspelled in the trial transcripts as "Pavlec."

could have made it. Pavlik added that Joe Seitz—a different alternative suspect—could also have done so. *Id*.

As noted, Prante testified in his own defense, proclaimed his innocence, denied the State's allegations that he left town shortly after the murder, denied all the supposed statements testified to by his friends or acquaintances, and denied he even had custody of the red Volkswagon several witnesses claimed they saw outside of Brown's house on the day of the murder. He admitted trouble with his memory (perhaps exacerbated by his use of marijuana) and making inconsistent statements about his whereabouts through the years as he struggled to reconstruct the day in his mind years later. R. 1880-1985.

v. Closing Arguments

The overwhelming majority of the State's closing arguments focused on the only supposed physical evidence in the case (bitemarks) and urged the jury to convict based on the fact that there were bitemarks, they were consistent with Prante, and he told people about it before law enforcement knew. "I believe the evidence irrefutably shows there are [bite marks]," the prosecutor emphasized to the jury. R. 2058. Weber continued: "The fact is there are human bite marks there, and John Prante knew about them three days after the killing and two years before we did; it's impossible for him to know that unless he's guilty of the offense of murder because he put the bite marks there." R. 2070. All of this is confirmed by "nationally known experts," and "Dr. Campbell said yesterday there absolutely are and you can see them from the pictures there are bite marks." R. 2069-70.

The State repeatedly relied on Spencer Bond and Vickie White testifying about Prante's comments about bitemarks: "[They] testified that Prante said that there were

bite marks on the shoulder of the victim." R. 2072. Confirming Prante was capable of doing such a thing, he told the jury that Prante previously bit Susan Lutz on the neck. R. 2078. The prosecutor ends the argument by noting, again, that there are "teeth marks without question. You have got human bite marks." R. 2093. Couple that with "the fact that one percent of the population is going to have teeth like his, . . . I think you can convict based on the teeth marks." The State then adds that is reinforced by "his knowledge about the bite marks to Vickie White, Mark White, and Spencer Bond." R. 2093.

The defense's closing argument was briefer and focused on disputing the State's now discredited "bitemark" evidence, calling the bitemarks the "only piece of corroborative evidence" and the only "physical evidence." R. 2106. The defense called the pictures supporting the bitemark testimony "valueless for comparison purposes." R. 2107. The defense explained that Prante always maintained his innocence throughout every statement. R. 2113. The witnesses who testified about Prante's statements about bitemarks might be relevant if it came forward in 1978, the defense argued, but not "in 1982 after it's been in the paper." R. 2105.

Almost the entirety of the State's rebuttal argument focused on the bitemarks: "[T]he evidence has shown they are bite marks, and they are consistent with John Prante's teeth." R. 2116. "No expert has come into this courtroom and told you that that's not a bite mark," explained Weber. R. 2116. "[T]hose are bite marks and they are human bite marks, and there isn't any doubt that they are human bite marks." R. 2117. And the prosecution reiterated the importance was not merely that they are consistent with Prante, but that Prante knew of their existence, told people about it, and gestured

toward his shoulder in relation to the location of the bitemarks: "The fact that he knows there's bite marks on the neck or on the shoulder are important." R. 2117.

Weber reiterated that the experts "testified to a reasonable degree of dental certainty," R. 2117, and he used analogies to demonstrate to the jury how ridiculous it was to conclude the supposed markings were anything but a bitemark. R. 2118-20. "That's a human bite mark on that girl. . . . We have got a whole bunch of bite marks that are clearly bite marks right here, and we have got some other marks down here that look exactly and have all the characteristics – every single characteristic of a human bite mark." R. 2120. And Weber reinforced that his two experts said the bitemarks are consistent with Prante's teeth, R. 2120, and "John Prante knows about the bite marks. He knows the area they are in." R. 2121.

D. Conviction, Sentencing, and Subsequent Appeals and Collateral Petitions.

After more than six hours of deliberation, the jury found Prante guilty of murder. R. 2152. During the death penalty qualification hearing that followed, the Court agreed with the State that Prante was death eligible. R. 2174-79. In his chance to allocute just moments before a judge would determine whether he would be sentenced to death, Prante again maintained his innocence. Indeed, he asked for his life to be spared so that he would "have the time to prove [his] innocence" and so he would "not have to give [his] life for the guilt of another person." R. 2252-2253.

The Court sentenced Prante to 75 years in prison. R. 2256. Prante raised three issues on direct appeal, including a claim that the evidence was insufficient to prove him guilty beyond a reasonable doubt. *Prante*, 147 Ill. App. 3d at 1041. This Court affirmed. *Id*. at 1065.

Prante's original post-conviction attempts to seek DNA testing or other relief failed. In 2017, upon the agreement of the State, the Circuit Court granted DNA and fingerprint testing motions. The most probative piece of evidence, Karla Brown's rape kit that showed seminal fluid, was unable to be located. Other DNA testing was unable to develop usable profiles. C. 2679.

Fingerprint testing focused on a coffee pot that had been in the coffee maker at the time Mark Fair left for work the morning of the murder but was discovered in the rafters of the basement after the murder. R. 908-909, 968-969, 1141-1142. The State's clear if not explicit theory was that the coffee pot was used to transport water to the metal lard can where Brown's body was submerged. R. 769 (State's opening statement: "We know the killer touched the coffee pot."). At the time of the initial investigation, police had recovered two fingerprints from that coffee pot—including one from the handle—and compared the prints to over thirty individuals, including Brown, Fair, several police officers involved in the investigation, and eventually Prante. C. 2758. All were excluded. C. 2758. The re-testing of those prints, including uploads into AFIS databases, did not reveal a match to anyone new, and the donor of those prints has never been identified. C. 2679.

E. Successive Post-Conviction Petition

In October 2018, Prante initiated the post-conviction proceedings that are the subject of this appeal, raising, *inter alia*, due process and actual innocence claims. C. 2633; C. 2650. The petition was supplemented once while it remained pending. C. 3070.

Most of the evidence in support focused on the colossal shift in the relevant scientific communities' beliefs about bitemark comparison. Dr. Iain Pretty, an expert

forensic odontologist, submitted two affidavits highlighting this point. C. 2720, 2930. Pretty's first affidavit described the findings of the National Academy of Sciences, the Texas Forensic Science Commission, and the President's Council of Advisors on Science and Technology, which have all concluded that bitemark evidence is scientifically invalid and unreliable. C. 2722-2724. Though at the time of Prante's trial "the use of bitemark evidence was a well-accepted forensic technique, generally understood by its practitioners and by the scientific community to be valid and reliable," in the intervening decades that "understanding has shifted significantly . . . as a result of new research and through the impartial review of the technique by a number of scientific bodies, as well as a growing number of wrongful convictions based on bitemark evidence." C. 2721.

As Dr. Pretty explained, it is not merely the ability of a forensic dentist to identify a "biter" that has been discredited in the last three decades, but also the ability of a forensic dentist to identify a bitemark *at all*—including, and especially, in cases with evidence found and documented so poorly as in this case. Dr. Pretty's own research, detailed in his affidavit, demonstrates that "even board-certified forensic dentists cannot reliably answer the threshold inquiry in bitemark analysis: whether the injury at issue is or is not a bitemark." C. 2726. Dr. Pretty explained there is simply no "evidence to support the fact that forensic dentists can even agree on what a bitemark **is**—never mind the more advanced proposal that this pattern may actually be linked to someone." C. 2723 (bold in original).

Dr. Pretty and Dr. Adam Freeman, a past-president of the American Board of Forensic Odontology ("ABFO"), the nation's only board-certifying entity for forensic

dentists, examined the validity and reliability of the first and most basic step in bitemark analysis. C. 2724-2725. Their 2009 study, *Construct Validity Bitemark Assessments Using the ABFO Bitemark Decision Tree* ("Construct Validity Study"), looked at "whether there was consensus between experienced experts viewing the same data" in particular, on the question of whether an injury was or was not a bitemark. C. 2725. Understanding whether experts can reliably reach the same conclusions is important because "bitemark matching relies on subjective analysis and not quantifiable data." *Id.* Dr. Pretty explained, "[t]he first stage in assessing the validity of a method is to determine if, given the same evidence, examiners of similar training and experience—in this case those who have passed the ABFO exam—reach the same conclusions (reliability)." C. 2725. Accordingly, Drs. Freeman and Pretty showed photographs of 100 patterned injuries drawn from real case work to ABFO board-certified Diplomates: "[t]hirty-eight diplomates completed all 100 questions, resulting in nearly 4,000 individual decisions." *Id*.

These Diplomates were asked "three basic questions concerning (1) whether there was sufficient evidence to render an opinion as to whether the patterned injury is a human bitemark; (2) whether the mark is a human bitemark, suggestive of a human bitemark, or not a human bitemark; and (3) whether distinct features (arches and toothmarks) were identifiable." C 2950-2951. Even for the threshold question of identifying a bitemark, "the results were shockingly poor, and determinations were wildly inconsistent across forensic odontologists on the vast majority of marks." C. 2725. There was unanimous agreement on this question in only four of the 100 cases, and there was concurrence of 90 percent or more in only 20. "By the time the analysts

completed question two—whether the photographed mark is indeed a human bite—there remained only 16 of 100 cases in which 90 percent or more of the analysts were still in agreement. . . . By the time the analysts finished question three—whether the bitemark has distinct, identifiable arches and individual tooth marks—they were significantly fractionalized on nearly all the cases. Of the initial 100, there remained just 8 case studies in which at least 90 percent of the analysts were still in agreement." *Id*. Accordingly, "even board-certified forensic dentists cannot reliably answer the threshold inquiry in bitemark analysis: whether the injury at issue is or is not a bitemark." C. 2726.

The fundamental inability of forensic dentists to reliably and consistently identify injuries as bitemarks was reinforced by a similar study in which the "qualitative data plainly verifie[d] the fact that there is a wide range of opinion expressed over even the most basic assumption in bitemark analysis: that of the origin of the mark itself." C. 2961-2962. That study's authors ultimately found that this "inconsistency indicates a fundamental flaw in the methodology of bitemark analysis and should lead to concerns regarding the reliability of any conclusions reached about matching such a bitemark to a dentition." C. 2950 (noting Page study found "wide variability among [bitemark] practitioners in their conclusions about the origin, circumstance, and characteristics of the patterned injury for all six images").

In addition to these broad scientific findings, Dr. Pretty also examined the photographs relied on by Drs. Levine and Campbell in light of this new scientific evidence. Dr. Pretty concluded that this evidence was of "the *lowest level of quality*," because "[t]he injuries show very mild bruising, no individual tooth marks are present, and only diffuse arches are visible." C. 2933 (emphasis in original). This injury is thus

of "low forensic significance and *cannot have been determined to have been caused by teeth, as opposed to some other mechanism of injury." Id.* (emphasis added). Further, Pretty noted that "[t]here [were] also significant failings in evidence collection, not least of which is the lack of any scale in the images provided," as well as significant distortion in some of the photographs." C. 2935. "Based on the substantial forensic scientific literature and on the materials," Dr. Pretty concluded "that the injuries at issue here could not and cannot be scientifically or reliably determined to be human bitemarks. The conclusion levels drawn by the forensic dentists in the case, even at the level of identifying these injuries as human bitemarks, would not be supported today." C. 2935.

Given that forensic dentists fail even at the basic level of reliably identifying injuries as bitemarks, it is no surprise that forensic dentists fare even worse when they attempt to move beyond identifying an injury as a bitemark, and, as in this case, attempt to associate it to an individual. Virtually every attempt by forensic odontologists to prove their claims has instead demonstrated a "disturbingly high false-positive error rate" in bitemark comparisons. C. 2968. At least four studies show alarming rates of misidentifications, in excess of 50% false positive rates, even under the most ideal of circumstances, C. 2967—to say nothing of the circumstances of this case.

Prante included other reports that demonstrate that every neutral scientific body to consider bitemark evidence has found it entirely lacking, including the National Academy of Sciences ("NAS"), an organization made up of the nation's most accomplished scientists "charged [by an Act of Congress] with providing independent,

objective advice to the nation on matters related to science and technology,"[5] which concluded in its groundbreaking report on forensics that "[t]he uniqueness of the human dentition has not been scientifically established," and "[t]he ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established." C. 2975. Two other prestigious scientific bodies—the Texas Forensic Science Commission[6] ("TFSC" or "Commission"), and The President's Council of Advisors on Science and Technology ("PCAST")—reached identical conclusions.

The TFSC found the inability of scientists to even agree on the threshold question of whether an injury is a bitemark particularly concerning, recommended the wholesale inadmissibility of bitemark comparison testimony in Texas cases, and vowed to review all previous Texas convictions that relied on bitemark analysis. C. 2555-2556. The PCAST report by a blue-ribbon federal panel was equally damning, noting that what little research has been done on bitemarks "cast[s] serious doubt on the fundamental premises of the field," including the distinctiveness of the dentition and the ability of human skin to reliably record that distinctiveness. C. 2949. Notably, PCAST found that research demonstrated that random dentition "matches occurred vastly more often than expected under the theoretical model," and, most critically, that "skin has been shown to

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[5] *See* National Academy of Sciences, *Mission*, *available at* http://www.nasonline.org/about-nas/mission/.

[6] *See* Tex. Crim. Proc. Code Ann. § art. 38.01 Sec. 4 (b-1)(1) (empowering the Texas Forensic Science Commission to report on the "observations of the commission regarding the integrity and reliability of the forensic analysis conducted").

be an *unreliable medium* for recording the precise pattern of teeth." [7] C. 2950 (italics added). And it reached the identical conclusion as all reports previously discussed regarding the threshold question: "Empirical research suggests that forensic odontologists do not consistently agree even on whether an injury is a human bitemark at all." C. 2950; *see also* C. 2720-2726. PCAST found that bitemark analysis did not come close to meeting the foundational validity standards for admission.

Finally, in his various filings, Prante included two dozen examples of cases where defendants convicted on the basis of bitemark comparison testimony were proven innocent by DNA or other evidence. C. 3040-54. The State's experts in this case, Drs. Campbell and Levine, made the original faulty comparisons in *five* of these cases. Their testimony has led to over a century of wrongful imprisonment, served by innocent

[7] Other peer-reviewed articles reach the same conclusion regarding human skin as a medium. S*ee, e.g.*, C. 2997 (Raymond G. Miller et al., *Uniqueness of the Dentition as Impressed in Human Skin: A Cadaver Model*, 54 J. FORENSIC SCI. (2009) (finding some dentitions were closer matches within measurement error to marks they did not make than the dentition that actually created the marks)*; Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1051 (N.D. Ill. 2015) ("A 2011 peer-reviewed article found that because skin easily distorts, it is a poor medium for bite marks; the article described an experiment in which a single 'dentition' was used to produce nearly a hundred bite marks in both skin and wax, and the resulting skin marks not only failed to match the dentition that created them, but were often closer matches to other dentitions (those that did not create the marks)."); *see also* C. 2950 (noting that research demonstrating "skin has been shown to be an unreliable medium" "cast[s] serious doubt on the fundamental premises of the field" of bitemark analysis.). C. 3004 (Mary A. Bush et al., *A Study of Multiple Bitemarks Inflicted in Human Skin by a Single Dentition Using Geometric Morphometric Analysis*, 211 FORENSIC SCI. INT'L 1 (2011) (bitemarks in skin from a single dentition were substantially different than dentition that produced it; marks matched multiple specimens)); C. 3013 (Mary A. Bush et al., *Biomechanical Factors in Human Dermal Bitemarks in a Cadaver Model*, 54 J. FORENSIC SCI. 167 (2009) (same dentition can create significantly different marks depending on body's movement, angle, and location relevant to Langer lines)); C. 3024 (Mary A. Bush et al., *The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model*, 55 J. FORENSIC SCI. 71 (2010) (bite force variation created unpredictable skin damage)); C. 3031 (Mary A. Bush et al., *Inquiry into the Scientific Basis For Bitemark Profiling and Arbitrary Distortion Compensation*, 55 J. FORENSIC SCI. 976 (2010) (same)).

prisoners convicted through subjective speculation masquerading as "scientific" evidence. C. 3040-54.

In a four-page opinion, the Circuit Court denied Prante leave to file the successive petition on all grounds. According to the opinion, Prante failed to establish that the repudiation of bitemark evidence presented in the petition was conclusive. C. 3164. The due process claim failed because the debunked bitemark evidence did not undermine the fundamental fairness of the trial because of other evidence placing Prante "at or near the crime scene." C. 3165.

F. Fifth District Decision, the State's Leave to Appeal, and the State's Opening Brief

The Fifth District reversed the due process finding, holding that Prante established a *prima facie* case of cause and prejudice by the State's use of faulty and unreliable bitemark evidence to obtain his conviction. *Prante*, 2021 IL App (5th) 200074, ¶¶ 62, 78-87. In so holding, as to prejudice, the Fifth District noted that "the State's case against petitioner was largely circumstantial." There was no dispute that Prante was near the scene and had opportunity, and that Prante provided a changing and unreliable account of his whereabouts on the day of the murder, but "[t]hese facts alone, however, are far from sufficient proof of guilt." *Id.* at ¶ 81.

The Fifth District explained that by far the most significant and "incriminating" evidence against Prante were his own reported statements coming from Vickie White and Spencer Bond, who claimed "the petitioner told them that Brown had 'teeth marks' on her body, specifically indicating the left shoulder area." *Id.* at ¶ 82. The "fact that no one identified these injuries as potential bite marks until years later was damning circumstantial evidence against petitioner." *Id.* "[T]he fact that the injury was definitely

identified as a human bite mark by the State's expert witnesses was likely enough to seal the petitioner's fate." *Id*. The Fifth District noted that the State's expert testimony "gave the impression" that the Whites and Bonds statements were "corroborated by scientific evidence." *Id.* at ¶ 84. "The persuasiveness of seemingly objective, truthful scientific evidence cannot be ignored or understated," *id,* all of which was reinforced by the fact that "the experts' bite mark testimony was frequently described as 'scientific,' with the experts touting recent advancements in bite mark 'technology'" throughout Prante's trial. *Id.* at ¶ 85.

Given this record, the Fifth District ultimately concluded that Prante's petition "effectively alleges, and supports with documentation, a recent change within the scientific community regarding the validity and reliability of bite mark evidence, suggesting that the evidence presented by the State at the petitioner's trial is no longer generally accepted within the scientific community." *Id.* at ¶ 87.

As to the actual innocence claim, the Fifth District agreed that "the new evidence about the validity and reliability of bite mark evidence would constitute new, material, and noncumulative evidence," it was not "conclusive of his innocence." *Id.* at ¶ 93. Citing Harold Pollard's testimony that Prante supposedly told him he knew the victim was found tied up in the basement, the Fifth District concluded there was enough "circumstantial evidence of the petitioner's guilt, even absent the State's expert testimony on bite mark analysis." *Id.* at ¶ 97.

Alleging that the Fifth District's decision conflicts with *People v. Milone*, 43 Ill App. 3d 385 (2d Dist. 1976), on the question of both whether bitemark evidence is presumptively admissible and scientific in nature, the State urged this Court to grant

leave to appeal. *People v. Prante*, No. 127241, State Petition for Leave to Appeal, at 3, August 10, 2021. This Court granted the petition. In both its brief and in a subsequent response to Prante's unsuccessful motion to dismiss the State's appeal as improvidently granted, the State has abandoned any pretense of relying on or the import of *Milone*, failing to cite it in either. *See People v. Prante*, Resp. in Opp. To Defendant-Appellee's Mot. To Dismiss the People's Appeal as Improvidently Granted, Feb. 28, 2022; St. Br. at i-ii (Points and Authorities (no citation to *Milone*)). Instead, as noted in the introduction to this brief, the State now acknowledges Prante satisfies "cause," St. Br. at 25, and the bitemark evidence presented at trial by the State is "discredited" and "unreliable," which is a constitutional violation if the bitemark evidence "so infected the trial that [his] resulting conviction . . . violated due process." St. Br. at 25. The State maintained the Prante could not show that the bitemark evidence did adequately infect his trial or rendered his trial "fundamentally unfair." St. Br. at 26, n. 8; St. Br. at 27.

STANDARD OF REVIEW

The denial of leave to file a successive post-conviction petition is reviewed *de novo*. *People v. Smith*, 2014 IL 115946, ¶ 21 (*de novo* for non-innocence claims under cause and prejudice test); *People v. Robinson*, 2020 IL 123849, ¶ 45 (*de novo* for actual innocence claims).

ARGUMENT

I. John Prante's evidence demonstrating the repudiation of the bitemark evidence presented at his trial presents a *prima facie* case to allow leave to file a due process claim in a successive petition.

The sum and substance of John Prante's successive post-conviction petition regarding the repudiation of the bitemark evidence introduced at his trial is the

allegation that the jury should have never heard expert testimony or any conclusion at all that a human bitemark was found on the victim's shoulder. This is because a decade's worth of new scientific study supports the conclusion that there would be no sound basis to do so in the context of the evidence in this case. The trial, however, was infused with the bitemark evidence, and most if not all the evidence inculpating Prante in the case was directly tied to the flawed and unsupported conclusion there was a bitemark at all. This record clearly establishes a *prima facie* case of a due process violation, and this Court must affirm the Fifth District's decision.

A. Applicable Law

The Post-Conviction Hearing Act allows a convicted defendant to assert that there was a substantial denial of his constitutional rights. *People v. Smith*, 2014 IL 115496, ¶ 22. There are two exceptions to the presumptive bar against successive petitions: The "fundamental miscarriage of justice" exception, which applies to constitutional claims of actual innocence brought pursuant to *People v. Washington,* 171 Ill. 2d 475, 489 (1996), and its progeny, *People v. Coleman,* 2013 IL 113307, ¶ 91, and the "cause-and-prejudice" test, for not bringing a claim in the first post-conviction petition. 725 ILCS 5/122-1(f); *People v. Pitsonbarger,* 205 Ill. 2d 444, 459 (2002).

Under either exception, a petitioner must obtain "leave of the court" to file a successive petition. *People v. Edwards,* 2012 IL 111711, ¶ 24. At the leave-to-file stage, in considering either exception, all well-pled facts are taken as true. *People v. Robinson*, 2020 IL 123849, ¶ 45; *see also Smith,* 2014 IL 115946, ¶ 35 (holding that leave to file under the cause-and-prejudice test should be denied only if from review of the pleadings and the documentation the claims fail as a matter of law). A trial court is "precluded

from making factual and credibility determinations" at this stage. *Robinson,* 2020 IL 123849, ¶ 45.

Leave to file must be granted if the petition makes a *prima facie* case of cause and prejudice. *People v. Bailey*, 2017 IL 121450, ¶ 24. Because the standard requires only a *prima facie* showing and the statute makes no provision for an evidentiary hearing, the State is not involved in the circuit court's determination of whether adequate facts have been alleged to allow leave to file. *Id.* at ¶¶ 25-27.

The meaning of both "cause" and "prejudice" is codified in the statute. 725 ILCS 5/122-1(f); *Bailey*, at ¶ 14. Cause refers to "an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." *Id.* A petitioner establishes prejudice "by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." *Id.*

B. There is no dispute Prante established cause.

The State explicitly acknowledges Prante's pleadings in the Circuit Court established cause: "Defendant has shown cause for not raising this claim in an earlier proceeding because the scientific evidence submitted in support of his claim did not exist at the time of trial or when he filed his initial postconviction petition." St. Br. 25 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002)). The State's concession is correct, as the supporting affidavits [from Dr. Pretty] and documents demonstrate that the conclusions regarding the lack of validity of bite mark evidence has occurred only in the past decade or so," long after the completion of the litigation on his 1993 post-conviction filings. *See Prante*, at ¶ 79.

C. Prante has established a *prima facie* case of prejudice.

The State affirmatively recognizes that the admission of later-determined unreliable expert testimony, including bitemark evidence, that is a "crucial, critical[,] highly significant factor" in a petitioner's conviction or otherwise "undermined the fundamental fairness of the entire trial" violates due process. St. Br. at 26 (alternatively citing *Perry v. New Hampshire*, 565 U.S 228, 237 (2012); *Han Tak Lee v. Glunt*, 667 F.3d 397, 403-06 (3d Cir. 2012) (new evidence demonstrating the fire science presented at trial was "fundamentally unreliable" could establish a due process claim); *Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (joining the Third Circuit, including *Glunt* and *Albrecht v. Horn*, 485 F.3d 103 (3d Cir. 2007), in concluding that "the introduction of flawed expert testimony at trial can be a due process violation if it 'undermined the fundamental fairness of the entire trial'") (quoting *Glunt*); *Ege v. Yukins*, 485 F.3d 364, 375-77 (6th Cir. 2007) (the admission of repudiated bite mark testimony violated the petitioner's constitutional rights "even in light of other circumstantial evidence against" the defendant). *See also People v. Genrich*, 471 P.3d 1102, 1123 (Colo. 2019) (Berger, J., specially concurring) (determining that Colorado law recognizes the same type of due process claim); *United States v. Ausby*, 916 F.3d 1089, 1092 (D.D.C. 2017) (introduction of false scientific evidence violates due process); *State v. Bridges*, No. 90 CRS 23102-04, 2015 WL 12670468 at *2 (N.C. Super. Ct. Mecklenburg Ct. 2015) (admission of debunked forensic evidence "violated the Defendant's right to due process because it exceeded the limits of the science and overstated the significance of the hair analysis to the jury").

At the same time, essentially every court that has examined bitemark analysis in the last decade has concluded it is not a reliable field. *See e.g.*, *Starks v. City of Waukegan*, 123 F.Supp.3d 1036 (N.D. Ill. 2015) ("There appears to be little, if any scientifically valid data to support the accuracy of bite mark comparison, and the data that does exist is damning."); *Howard v. State*, 300 So. 3d 1011, 1019 (Miss. 2020) (explaining that the petitioner's "evidence as to the change in the scientific understanding of the reliability of identification through bite-mark comparison was almost uncontested[,] and "a forensic dentist would not be permitted to identify Howard as the biter today"); *Ex parte Chaney*, 563 S.W.3d 239, 258 (Tex. Crim. App. 2018) (State acknowledging that the "bitemark evidence, which once appeared proof positive of . . . Chaney's guilt, no longer proves anything[,]" and the court agreeing that "[t]he body of scientific knowledge underlying the field of bitemark comparisons has evolved since his trial in a way that contradicts the scientific evidence relied on by the State at trial"); *State of Georgia v. Sheila Denton*, No. 04-R-330, 2020 WL 7232303, at *13 (Ware Co. Super Ct. Feb. 7, 2020) (Gillis, C.J.) ("Proven unreliable scientific evidence should never serve as the basis of a conviction and should be dealt with by the [c]ourts if and when it is found. Applying such an analysis to the facts of this case, it is uncontroverted that bite mark analysis and testimony as existed at the time of [the defendant's] conviction has been proven to be unreliable and not generally accepted within the scientific community of forensic odontology."); *State v. Roden*, 437 P.3d 1203, 1209 (Or. Ct. App. 2019) (State conceding, and the court so holding, that the bitemark evidence from trial was flawed and inadmissible).

For purposes of this appeal, the State, too, acknowledges that "the bitemark evidence presented at trial has now been discredited and deemed unreliable by the scientific community." St. Br. at 25. What that means, in the context of what Prante pled with affidavits and supporting material, is that the State would not have been able to present expert testimony that the marking on the shoulder was a bitemark at all. C. 2720-3038. To this end, the sole relevant dispute is whether Prante met his initial burden to establish that the "discredited" and "unreliable" bitemark evidence "so infected his trial" as to constitute a violation of due process.

The State puts forward a couple of flawed factual arguments as to why Prante has not met its burden, but in doing so disregards the procedural posture that requires Prante establish only a *prima facie* case of prejudice at this leave to file stage. *See Bailey*, 2017 IL 121450, ¶ 24. "*Prima facie* evidence is in the nature of a presumption, more accurately described as an instructed inference." *People v. Robinson*, 167 Ill. 2d 53, 75 (1995) (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 304.1, at 114-16 (5th ed. 1990)). It is defined "as a quantum of evidence sufficient to satisfy the burden of production concerning a basic fact that allows an inference of a presumed fact." *Id* (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 302.8, at 102). In this context, if this initial burden of production is satisfied, leave to file would be granted, and the burden of persuading the trier-of-fact on the prejudice question would come later in the post-conviction process. *See id*; *see also Bailey*, 2017 IL 121450, ¶¶ 25-26 (recognizing after leave to file is granted, the post-conviction process commences and the State ultimately "would have an opportunity to seek dismissal" on any ground, including the lack of prejudice).

As the statement of facts makes obvious, the record is replete with examples of how the bitemark evidence infected this case or was "crucial," as the standard is defined by the State. St. Br. at 26, 32 (citing *Ege*, 485 F.3d at 375). Indeed, Prosecutor Don Weber used this very word—"crucial"—in the context of the bitemark evidence. R. 879. Wood River Chief of Police called the bitemarks "the key factor" in leading to the arrest of Prante. C. 257. Weber explained the bitemarks were the "real break" that changed the course of the investigation and led to Prante's arrest. C. 265. Warrant applications detail the significance of the bitemark findings to Prante's arrest. C. 468-74. And throughout the trial, the prosecution presented the discovery of the purported bitemark as the "big break" in supposedly solving the case. R. 774-77. Given that Prante's arrest was directly linked to an "expert's" discovery of supposed bitemarks on an unscaled, black-and-white photograph—a discovery the State now acknowledges an expert could not make—it is difficult to imagine how one could conclude Prante has not shown the "quantum of evidence" sufficient to allow the very inference law enforcement explicitly acknowledges. *See Robinson*, 167 Ill. 2d at 75.

As for drawing an inference that the record supports that bitemarks "infected the trial," it is equally difficult to imagine how that inference could not be drawn. From *voir dire*, through opening statements, through debates about the admission of evidence, through the State's presentation of its case, through the defense's case, through rebuttal evidence, through closing arguments—the purported bitemarks were infused into the narrative of this trial. The prosecutor literally asked every *venire* member about their position or knowledge of "bite mark technology," R. 173-729, he told the jury in opening statements that the bitemarks "should be keyed in on," R. 735-54, and

bitemarks were discussed, to some extent, with the vast majority of the State's witnesses and was the primary focus of the State's rebuttal evidence. As to closing and rebuttal arguments, the State essentially framed the existence of human bitemarks on the victim as an undisputed fact and because Prante supposedly spoke of them before law enforcement knew of them, he's obviously guilty: "[I]t's impossible for him to know that unless he's guilty," Weber told the jury. R. 2070.

This Court cannot countenance the State explicitly telling Prante's jury (and the general public) that the bitemarks are "crucial," "key," and undisputed and then try and tell this Court to pretend that it was never important when it turns out the evidence is akin to witchcraft. And it is a particularly problematic position given that we know that jurors give expert "scientific" testimony significant weight. *State v. Krause*, No. 2 CA-CR 2015-0326-PR, 2015 WL 7301820, at *5 (Ariz. Ct. App. Nov. 19, 2015) (citations omitted); *see also Chapman v. State*, 638 P.2d 1280, 1290 (Wyo. 1982) ("Jurors tend to give considerable weight to scientific evidence when presented by experts with impressive credentials."); *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) (expert scientific evidence can have "talismanic significance" for jurors); *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (noting the danger that jurors impute "a posture of mystic infallibility" to forensic experts).

The long and short of the State's argument to deny relief is its claim that there is evidence independent of bitemarks supporting Prante's guilt. St. Br. 29-31. But even putting aside the *prima facie* limitation at this stage, which the State ignores, the claim that there may be other evidence supporting Prante's guilt is irrelevant to the due process analysis. Due process requires a consideration of whether the bitemark evidence "so

infected" the trial to make the proceedings "fundamentally unfair." The State does not grapple with that standard at all, nor could it reasonably do so, as it was the prosecution itself that repeatedly infected the investigation and trial with what it now acknowledges was an unreliable and unscientific technique. The fact that the defense at trial was foisted into defending against the State's unreliable evidence (at a time when its unreliability was not established, which, again, the State acknowledges by conceding "cause") only "infected" the trial more. Contrary to the State's argument, St. Br. 28-29, this reinforces the due process violation rather than mitigating it.

But even if other evidence of guilt is relevant to the due process analysis, the so-called "considerable" other evidence not tied to the bitemarks highlighted by the State is not probative. *See* St. Br. 29-31. For example, the State cites Prante's supposed "considerable sexual interest in her" and anger at not being invited to her party the night before. St. Br. 29 (citing to Scroggins' testimony). Yet Scroggins (nor Spencer Bond nor anyone else) came forward with this theory or evidence at the time of the initial investigation, even though Scroggins spoke with the police. If this stated "sexual interest" is such an important fact that supports the conviction even without the bitemarks, you would think the witnesses who supported that very fact would have at least thought to tell the police about it *four years earlier* when they were looking for the woman's killer. But they did not. Instead, it surfaced only after a high-profile local media campaign and a criminal profiler put law enforcement's focus on Prante (who then was put under 24-hour surveillance in the small town). So even if this Court accepts the dubious claim that Prante's supposed talk of the victim's bitemarks seemed unimportant at the time to the friends and acquaintances that came forward years later,

the same cannot be said of Prante's supposed sexual interest and anger toward the victim. All that is to say there is a strong indication that this "evidence" is best explained by flawed memories or otherwise unreliable. C. 2471-80.

So, too, of the State's reliance on Harold Pollard, Vickie White, or any other individual's memories that Prante told them the victim's body was "curled up on the floor." St. Br. 30-31. Independent of whether this, too, is a flawed memory, it is not probative because it is untrue. As the Fifth District correctly noted, the victim's body was not "curled up on the floor," it was bent over a lard can. *See Prante*, 2021 IL App (5th) 200074, ¶ 82, fn. 2.

And the State is really grasping at straws in relying on Edna Moses (who was hypnotized during the course of the investigation, C. 1610) and Eric Moses (who was six years old, R. 1066) that the unknown man they witnessed speaking to Karla Brown on the morning of her murder was some sort of corroboration for Edna Vancil—who testified that Prante "disappeared" from Paul Main's porch from 11:00 a.m. – 12:00 p.m. that day. St. Br. 30. It is difficult to unpack how much is wrong with this theory, but Prante will try.

For one, Edna Moses told police that she saw the man talking to the victim just before 11 a.m., C. 1161—that does not corroborate Vancil, it conflicts with her theory that Prante remained on Main's porch until 11:00 a.m. until they "disappeared" for an hour. As far as Vancil, her insistence four years later she can remember Prante's precise comings and goings by the hour (recall there is no real dispute Prante was at Main's that day) is ridiculously far-fetched and conflicts with scientific understandings of memory

and common sense.[8] C. 2471-80. Like everyone else, Vancil, of course, never initially told police any unusual behavior related to Prante (like "disappearing" during the time of her death)—even though she did speak to the police immediately. (She made no mention of Prante at all to police in 1978.) C. 1066. Rather, Vancil focused on and told police about some other unknown man with a white or red vehicle that she saw outside Brown's home at the time. C. 1066. This unknown man was clearly not Prante, who Vancil knew.

Ultimately, even if you suspend disbelief and accept Vancil's rationale for her recall of a four-year-old memory about Prante's comings and goings at 11:00 a.m. on June 21, 1978 (her soap opera came on at 11:00 a.m., R. 1090), it exonerates rather than inculpates Prante: Helen Fair testified that Brown got off the phone with her well before 11:00 a.m. to answer the door, which the State suggested was Prante's entrance into the home. R. 1054 (Fair testifying after hanging up with Brown she left to a friend's house and arrived before 11:00 a.m.). So, if according to Vancil, Prante did not leave Main's porch from 10:00 – 11:00 a.m., how was he at Brown's front door before 11:00 a.m? And if six-year-old Eric Moses supposedly saw what the State asserts was Prante fighting with Brown on the driveway around 11:00 a.m., then how is it that Prante knocked on the door interrupting Brown's call with Helen Fair before that? Is the State now theorizing that Brown did *not* let Prante through the front door at that time, but rather she followed him out to the front of her driveway to have an argument with him,

[8] There is at least some independent evidence that proves Vancil's memory is flawed, as she insists she saw Prante arrive in his *red* Volkswagen that day. R. 1085. Several witnesses testified that Prante did not have access to the red Volkswagen for some months later when his father gave it to him, but rather was driving a blue Volkswagen in June 1978. R. 1689-91, 1694-95, 1904.

only then to let him come in after that (or, despite no evidence, he broke in?), yet Edna Vancil never noticed that but rather was sure Prante never left the porch before 11:00 a.m. None of it makes sense. And it certainly is not the sufficient evidence untainted by bitemarks that independently corroborates Prante's guilt that the State argues it is.

Finally, as the trial prosecutor did, the State relies on Prante's "shifting accounts of his whereabouts" on the day of the crime. St. Br. at 29. The record is clear that Prante struggled to recreate that day in his mind, especially when he began to realize he was the target of the investigation four years later. To that end, Prante would maintain that these divergent accounts are not, in fact, untainted by the bitemark evidence, as Prante only became the key suspect because of the "bitemarks." And only then, when he realized he was being targeted, did he erroneously try to recreate memories of a day four years earlier in his mind. But even putting that to the side, the Fifth District addressed this same issue, and correctly concluded that Prante's proximity to the crime and "changing and unreliable account are far from sufficient proof of guilt." *Prante*, 2021 IL App (5th) 200074, ¶ 81.

In short, it is highly questionable whether the due process question requires anything more than an analysis of whether the bitemarks "infected" the investigation and trial, which they plainly did. Even if an analysis of other evidence untainted by the bitemarks is relevant, it is clearly insufficient to deny relief. All of this is particularly so at this stage of the process, which requires no more than Prante make a *prima facie* showing. This Court plainly must affirm the Fifth District's due process finding and allow Prante's post-conviction petition to proceed.

D. The State's concern about the Fifth District's *Frye* analysis is a red herring and much ado about nothing.

The State spends several pages of its brief arguing that the Fifth District took the wrong analytical approach in its discussion of whether the bitemark evidence admitted at trial in this matter could meet the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), standard for admissibility. St. Br. at 32-36. But the argument is neither here nor there.

Contrary to the State's contention, St. Br. at 32, the Fifth District did not consider the *Frye* issue *in lieu of* the due process issue—it plainly considered the due process issue. *See Prante*, 2021 IL App (5th) 200074, ¶ 62 (framing the issue as "[t]he petitioner contends that his constitutional right to due process of law was violated by the State's use of faulty and unreliable bite mark evidence to obtain his conviction" and ultimately holding that Petitioner satisfied the cause-and-prejudice standard for that issue). Rather, the Fifth District discussed the *Frye* standard as a vehicle to show that the methodology of the State's bitemark trial evidence was so unreliable that it might not even meet the general acceptance standard for scientific evidence, as evidenced by the unrebutted affidavits from Dr. Pretty. *Prante*, 2021 IL App (5th) 200074, ¶ 67. Indeed, the Fifth District noted that *People v. Milone*, 43 Ill. App. 3d 385 (2d Dist. 1976), was erroneously decided, but the law of the land at the time, in order to highlight that Prante satisfied the "cause" element because he could not raise these issues earlier. *See Prante*, 2021 IL App (5th) 200074, ¶ 79.

While the State takes the Fifth District to task for its analytical approach, what the State fails to remember is that during the briefing below the State urged the Fifth District to affirm by relying on *Milone*. *Prante*, 2021 IL App (5th) 200074, ¶ 63 (In

urging the Fifth District to affirm the circuit court's denial of leave to file, "the State asserts that bite mark evidence is still admissible in Illinois, citing *Milone*, 43 Ill. App. 3d at 398.") The State has now properly abandoned any reliance on *Milone* (it does not cite it in its brief once), and, again, as noted, the State has properly concluded that "for purposes of this appeal that the bitemark evidence presented at trial has now been discredited and deemed unreliable by the scientific community." St. Br. at 25. But that plainly was *not* the position the State took in the Fifth District. There was certainly nothing wrong with the Fifth District analyzing the flawed underpinnings of *Milone* to counter the State's arguments, including that "[f]urther developments in the law [] have eroded *Milone*'s holding." *Prante*, 2021 IL App (5th) 200074, ¶ 74.

In the end, it is not clear to Prante what the State's point is in spending multiple pages of its brief condemning the Fifth District's analytical approach. Prante cannot imagine the State is taking the position that it would be proper to *admit* plainly unreliable and repudiated expert evidence even if the State maintains a position that bitemark evidence is "nonscientific" and should not be subject to *Frye*. *See e.g.*, *People v. King*, 2020 IL 123926, ¶ 40 (highlighting how unreliable expert testimony can be overly persuasive to a jury). Rules of Evidence 401 (relevance) and 403 (evidence is inadmissible if danger of under prejudice substantially outweighs relevance) still apply. Needless to say, the acknowledged "discredited" and "unreliable" evidence clearly would not meet a relevance standard, and the State seemingly would not and cannot rely on it. *See* St. Br. at 25 (State acknowledging its own bitemark evidence from trial was "discredited" and "unreliable"). Since the repudiated bitemark evidence, however, was admitted at trial, and the State acknowledges that can be a due process violation, St. Br.

at 26, this Court's only real concern should be whether Prante has made a *prima facie* case of cause-and-prejudice. For all the reasons stated throughout this brief (including the State's concession on "cause"), this Court should so find.

II. John Prante has also established a *prima facie* case of actual innocence, and he should be allowed leave to file that claim as well.

Both the Circuit Court and Fifth District found that the new evidence about the validity and reliability of bitemark evidence constitutes new, material, and noncumulative evidence. C. 3164; *Prante*, 2021 IL App (5th) 200074, ¶ 93. Both courts, however, concluded that Prante did not establish it was conclusive. *Id.* However, given the State's concession in this Court that, at this stage, the People assume its own bitemark evidence from trial "has been discredited and deemed unreliable," this tilts the scales to show that Prante has established a *prima facie* case of actual innocence as well.

A request for leave to file a successive petition raising actual innocence "should be denied only where it is clear from a review of the petition and supporting documentation that, as a matter of law, the petition cannot set forth a colorable claim of actual innocence." *People v. Robinson*, 2020 IL 123849, ¶ 44. All well-pled facts must be taken as true, and the court should refrain from making factual and credibility determinations. *Id.* at ¶ 45.

To establish an actual innocence claim, the supporting evidence must be (1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *Id.* at ¶ 47. The bitemark evidence is newly discovered for the same reason Prante established "cause" for the due process claim—the "supporting affidavits and documents demonstrate that the examination as to the validity of bite mark evidence has occurred only in the past decade or so." *Prante*,

2021 IL App (5th) 200074, ¶ 79. It therefore could not have been discovered earlier with due diligence. *See Robinson*, 2020 IL 123849, ¶ 47. It is noncumulative since the trier-of-fact heard extensive testimony and argument that the evidence was valid and reliable, or the opposite of what we now know is true. *See id*. And it is material because the repudiation of the bitemark evidence, and in particular any evidence saying the purported bitemarks are consistent with Prante's teeth, is probative and relevant to his long-maintained innocence. *See id.*

That leaves consideration as to whether the new evidence makes a colorable claim that it is conclusive. This requires a consideration of whether the evidence places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. *Id.* at ¶ 48. It need not be entirely dispositive, and probability, not certainty, is the key. *Id.* In making this determination, the court considers the new evidence alongside the trial evidence. *Id.* at ¶ 47.

The State acknowledges the bitemark evidence it presented at trial "has now been discredited," so it seemingly would not present it at a new trial. Without that presentation of evidence, a huge portion of the State's case unravels, including all its expert witnesses on the bitemark, Spencer Bond and Vickie White's belated memories of Prante mentioning a bitemark, and Susan Lutz's eleventh-hour testimony that Prante bit her during sex. None of it would be relevant or probative. What's more, the State's new concession in this Court—which it did not make in the Fifth District—quells the Appellate Court's distinction between whether the State *could* still argue that the photographs *may* show a bitemark. *See Prante*, 2021 IL App (5th) 200074, ¶ 94-95. It appears the State is now conceding that the evidence would not even support that

argument and it would not present it, as it is unreliable, or at least for this Court's consideration at this stage.

But even putting that aside, the Fifth District gave short shrift to other strong evidence in the record supporting Prante's innocence. Notably, this includes the exculpatory fingerprints on the coffee maker, which have never been identified or linked to anyone in the house or any investigating law enforcement agent—yet the State insists (and the evidence justifies) it was used by the perpetrator to transport water into the lard can during the course of this heinous crime. So, too, of viable alternative suspects that surfaced during the investigation at trial, like Joseph Millazo, who, unlike Prante, one witness insisted confessed, R. 1671-81, or Joe Seitz, who, unlike Prante, had a history of violent behavior and direct threats to the victim, C. 1280-81—both of whom law enforcement and the prosecution dismissed as viable suspects only because their teeth were purportedly excluded from the bitemark comparison. R. 1623-24, 2019. Given the evidence that there were no bitemarks at all, they should not be so easily excluded. Under the dictates of *Robinson*, this Court must consider the new evidence in conjunction with the trial evidence to determine whether there is a colorable claim of conclusiveness. *See Robinson*, 2020 IL 123849, ¶ 48. The exculpatory fingerprints are highly probative evidence of innocence that is already in the record, and the alternative suspects provide additional support reinforcing the claim of innocence.

This Court also should not ignore the many examples of innocent individuals being convicted based on flawed bitemark testimony. *See* C. 3040-51 (listing 24 innocent individuals wrongfully convicted based on bitemark evidence); C. 3052-54 (listing seven more wrongful indictments of innocent individuals based on bitemarks);

C. 3072-75 (supplemental petition listing several more wrongful convictions that surfaced after the initial filing). Given the full-scale repudiation of the bitemark evidence that was the focal point of the investigation and trial, coupled with the powerful exculpatory physical evidence from the fingerprints and the minimal inculpatory evidence untainted by the bitemarks, Prante has met his actual innocence burden at this stage.

CONCLUSION

For the reasons stated, John Prante respectfully requests this Court affirm the Fifth District Appellate Court's decision and remand to the Circuit Court for further proceedings.

Respectfully Submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages or words.

DATED: July 7, 2022

/s/ Joshua A. Tepfer
Joshua A. Tepfer

DOCKET NO. 127241
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Petition for Leave to Appeal
	)	from the Appellate Court of Illinois,
Appellant,	)	Fifth Judicial District,
	)	No. 5-20-0074
	)	
v.	)	There on Appeal from the Circuit
	)	Court of Third Judicial Circuit,
JOHN PRANTE,	)	Madison County, No. 82 CF 381
	)	
Appellee.	)	Honorable Neil T. Schroeder
	)	Judge Presiding.

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PLEASE TAKE NOTICE that on July 7, 2022, Appellee John Prante filed via the Odyssey E-File system in the Supreme Court of Illinois the Brief of Appellee, Cross Relief Requested, a copy of which is hereby served upon you.

DATED: July 7, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2022, I caused a copy of the foregoing Proof of Service and accompanying Brief of Appellee, Cross Relief Requested to be served on the following via the Court's Odyssey E-File and Serve system:

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VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

DATED: July 7, 2022

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