In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2023-0213
	:	
Appellee,	:	On Appeal from the
	:	Medina County
v.	:	Court of Appeals,
	:	Ninth Appellate District
KENNETH ALEX GRAD,	:	
	:	Court of Appeals
Appellant.	:	Case No. 22CA0011-M

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

This case involves Kenneth Grand's third attempt to introduce evidence that he had available to him at trial but chose not to present. Grad was convicted in 2014 of abusing his six-week-old child, "W.G." Jan. 18, 2022 Journal Entry, R.10 at 1–2; *see also State v. Grad* ("*Grad I*"), 2016-Ohio-8388 ¶¶2, 4 (9th Dist.). Although Grad had retained several experts who would have testified that W.G.'s injuries were caused by genetic abnormalities, malnutrition, or other medical causes rather than abuse, he chose not to call those experts at trial. *Grad I*, 2016-Ohio-8388 at ¶¶5, 8–9. He chose instead to cross-examine the State's experts without presenting any countervailing experts of his own. *Id.* Grad's trial strategy did not work as well as he hoped, and a jury convicted him of five counts of endangering children and three counts of felonious assault. *Id.* at ¶4.

Grad has spent the years since his conviction seeking a do-over. On direct appeal, he argued that his trial counsel were ineffective because they did not present their own experts. *Id.* at ¶¶5–9. The Ninth District rejected his ineffective assistance claim, *id.* at ¶9, and this Court declined to review its decision, *10/11/2017 Case Announcements*, 150 Ohio St. 3d 1452, 2017-Ohio-8136. Grad also sought postconviction relief pursuant to R.C. 2953.21. *State v. Grad* ("*Grad II*"), 2017-Ohio-8778 ¶1 (9th Dist.). He again argued that his counsel was ineffective for failing to call any expert witnesses to testify on Grad's behalf. *Id.* at ¶3. The trial court rejected Grad's petition for postconviction relief, *id.* at ¶1, the

Ninth District affirmed, *id.*, and this Court again declined review, *05/23/2018 Case Announcements #2*, 152 Ohio St. 3d 1481, 2018-Ohio-1990.

Grad now challenges his conviction through a request to file a new-trial motion. Very little has changed since the last time Grad challenged his conviction. At its core, Grad's challenge to his convictions remains the same. As in his last two appeals he argues that he should be allowed to present scientific evidence that challenges the State's experts' conclusions that W.G. had been abused. *See* Grad Br.11–13. The primary difference between this case and Grad's prior two challenges is that, in this case, Grad attached to his motion for leave to file a motion for a new trial several scientific articles that were published after his trial. *See* Motion for Leave, R.3 at Ex.A(1), Ex.A(2), Ex.A(3), Ex.B(1). Because the articles were published after trial, Grad argues that he made a *prima facie* showing that he was unavoidably prevented from discovering the evidence that formed the basis for his motion for leave and that Criminal Rule 33 required the trial court to at least hold a hearing on his motion. Grad Br.11–13, 26.

Grad is wrong; not every newly published scientific article is newly discovered evidence. That is particularly true in this case. Although the articles attached to Grad's petition may have been published after his trial ended, they all deal with the same issue that the experts he retained for trial would have testified about: the possibility that W.G.'s injuries were caused by medical conditions and were not the result of abuse. *Compare Grad I*, 2016-Ohio-8388 at ¶¶8–9 with Motion for Leave, R.3, Ex.A & B.

If Grad is right that every new scientific article qualifies as new evidence under Criminal Rule 33(B) then there will be no limit to the number of times a convicted defendant can seek a new trial. This case provides a perfect example. Under Grad's rule, he could have filed a Criminal Rule 33 motion for a new trial every time a scientific article relevant to his claims was published. In this case, that would mean that in addition to the motion at issue here, he could have also filed a motion for a new trial in 2016, 2017, and 2019. *See* Motion for Leave, R.3 at 1–2. It would also mean that the trial court would have been required to at least hold a hearing on every one of those motions. Such a rule is unworkable. "All disputes must come to an end, even those concerning grave accusations of crime." *See Scruggs v. United States*, 929 F.2d 305, 307 (7th Cir. 1991). For Grad, the end is now.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. He is interested in the finality of criminal convictions and the proper application of Criminal Rule 33.

STATEMENT OF THE CASE AND FACTS

In 2014, a jury convicted Kenneth Grad of five counts of endangering children and three counts of felonious assault. *Grad I*, 2016-Ohio-8388 at ¶4. The victim was his six-week-old child, W.G. *See id.* at ¶2. Grad and his wife Laura had taken W.G. to a podiatrist

because one of W.G.'s feet was swollen. *Id.* The podiatrist determined that W.G.'s injuries were more severe than could be handled with just an office visit and persuaded the Grads to take W.G. to the hospital instead. *Id.* At the hospital, x-rays showed that W.G. currently had a broken tibia in his left leg, along with a variety of other fractures at different stages of healing. *Id.* All told, the x-rays revealed that W.G. had suffered 26 different fractures during his first few weeks of life. *Id.*

The Grads had no explanation for what might have caused a majority of W.G.'s injuries. *Id.* at ¶3. Further medical testing provided no answers either. A genetic test of W.G.'s blood was negative for osteogenesis imperfecta (which causes brittle bones). *Id.* And a test for hypermobility came back negative after W.G's pediatrician tested W.G. for the condition because his mother Laura reported that she had been diagnosed with it. *Id.* Having ruled out other possible causes of W.G.'s injuries, the doctors ultimately concluded that his injuries were "highly suggestive of child abuse." *Cf. State v. Laura Grad*, 2012-Ohio-1385 ¶8 (9th Dist.).

A grand jury indicted Grad in 2008 for five counts of endangering children and three counts of felonious assault. Jan 18, 2022 Journal Entry, R.10 at 1. After many years of delay, caused in large part by Grad's repeated changes of counsel, the case finally came to trial in 2014. *Id.* at 1–2. At trial, the State called several experts who testified that W.G. did not have any medical conditions that would have explained his injuries. *Grad I*, 2016-

Ohio-8388 ¶5. Grad did not call any experts. *Id.* He chose instead to challenge the State's experts on cross-examination. *See id.* at ¶8.

Grad's trial strategy proved unsuccessful in winning acquittal. Although Grad's counsel "got the State's expert witnesses to concede that there were additional tests that could have been done to further investigate whether W.G. had an underlying bone disorder that made his bones "fracture under normal handling," *id.* at ¶8, a jury still convicted Grad on all of the charged counts, *id.* at ¶4.

Grad appealed, arguing in part that his trial counsel was ineffective because they failed to call any medical experts on his behalf. *Id.* at ¶5. Grad argued that it was objectively unreasonable to rely on cross-examination in a case that turned so heavily on expert testimony. *Id.*

The Ninth District rejected Grad's argument and affirmed his convictions. The court of appeals detailed the many ways in which Grad's counsel challenged the State's experts at trial. *Id.* at ¶8. And it held that the decision about whether to call an expert witness is a matter of trial strategy and that it was not unreasonable for Grad's counsel to choose to rely instead on cross-examination. *Id.* at ¶7. Grad appealed to this Court, which denied review. *See 10/11/2017 Case Announcements*, 150 Ohio St. 3d 1452, 2017-Ohio-8136.

Grad also filed a petition for postconviction relief. *Grad II*, 2017-Ohio-8778. Grad's petition, like his direct appeal, argued that Grad had received ineffective assistance of

counsel at trial. *Id.* at ¶3. His petition identified experts that he says his trial counsel could have called, along with expert reports and opinions that Grad argued were "not part of the record on direct appeal." *Id.* at ¶7 (quotation omitted). The experts identified in Grad's petition included Dr. David Ayoub and Dr. Michael Holick. *See* Jan. 18, 2022 Journal Entry, R.10 at 2.

The trial court denied Grad's petition. It concluded that the arguments Grad made were similar to the arguments he made on direct appeal and were therefore barred by *res judicata*. *Grad II*, 2017-Ohio-8778 at ¶5. Grad appealed, but because he did not challenge the trial court's *res judicata* holding, the Ninth District affirmed. *Id.* at ¶¶5, 7–8. This Court again denied review. *05/23/2018 Case Announcements #2*, 152 Ohio St. 3d 1481, 2018-Ohio-1990.

Seven years after his trial ended, Grad filed a motion for leave to file a motion for a new trial. Motion for Leave, R.3. He again argued that there were medical explanations other than abuse for W.G.'s injuries and that the State's experts were wrong when they concluded otherwise. *See id.* at 16. And he again offered the opinions of Dr. Ayoub and Dr. Holick as support for his arguments. *See id.* at Ex.A & Ex. B. Along with affidavits from the two doctors, Grad pointed to scientific studies published in 2016, 2017, 2019, and 2021 that he claimed, because of their publication date, qualified as newly discovered evidence that he could not have discovered and produced at trial. *See id.* at 1–2.

The trial court denied Grad's motion for leave without a hearing. Jan. 18, 2022 Journal Entry, R.10 at 7. That motion, the court held in relevant part, was nothing more than "another attempt by Grad to present evidence and make arguments post-trial which should have been presented at trial." *Id.* at 6. The trial court noted that Grad's trial counsel had made the strategic decision not to call Dr. Ayoub or Dr. Holick at trial, and that his motion for leave simply sought to get "those same experts in front of a new jury to present the same arguments those experts would have presented in 2014." *Id.* at 6. The trial court also held, that the scientific studies were not new evidence. Although they were published after Grad's trial, the court concluded that those studies were "cumulative to former evidence that *could have* been presented" before. *Id.* (emphasis in original).

Grad appealed and the Ninth District affirmed. *State v. Grad*, 2022-Ohio-4221 ¶1 (9th Dist.) ("App.Op."). Like the trial court, it noted that Grad's attorneys had "thoroughly cross-examined" the states experts on the same topics that Grad raised in his motion for leave to file a motion for a new trial and that the studies that Grad included with his motion were "premised on the same theories upon which the State's expert was cross-examined." *Id.* at ¶11. Because Grad was not unavoidably prevented from discovering the evidence that he attached to his motion for leave, the Ninth District held that the trial court did not abuse its discretion by denying that motion. *Id.* at ¶12. It affirmed the trial court's decision, *id.* at ¶1, and denied Grad's motion for reconsideration, Dec. 30, 2022 Journal Entry, R.16.

Grad appealed to this Court, and the Court initially declined review. *See 04/11/2023 Case Announcements*, 169 Ohio St. 3d 1491, 2023-Ohio-1149. Grad moved for reconsideration, and the Court granted his motion and accepted two of his propositions of law. *06/20/2023 Case Announcements*, 170 Ohio St. 3d 1451, 2023-Ohio-1979.

ARGUMENT

Although Grad has presented two separate propositions of law, both propositions deal with a single question: Do recently published scientific studies automatically qualify as "new evidence" for purposes of Criminal Rule 33(B)? The answer is no. Because that answer resolves both of Grad's propositions, this brief addresses them together, with a single proposition of law in response.

***Amicus* Attorney General's Proposition of Law:**

> *A scientific article published after a trial is over is not new evidence for purposes of Crim.R. 33 when the conclusion of the article was known at the time of trial or could have been known with reasonable diligence*.

Seven years after a jury convicted him of felonious assault and child endangerment, Grad filed a motion for leave to file a motion for a new trial. He cited, as the primary basis for his motion, scientific articles that were published in the years following his trial. *See* Motion for Leave, R.3 at 1–2. The trial court denied Grad's motion for leave without holding a hearing, reasoning that the articles did not constitute new evidence and that the motion was "yet another attempt by Grad to present evidence and make arguments post-trial which should have been presented at trial." Jan. 18, 2022 Journal

Entry, R.10 at 6. The Ninth District correctly held that the trial court did not abuse its discretion when it denied Grad's motion. Grad has provided no compelling reason for the Court to hold otherwise.

I. The trial court did not abuse its discretion when it denied Grad's motion for leave to file a motion for a new trial.

"The importance of finality in any justice system, including the criminal justice system, cannot be understated." *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). That is why, while Criminal Rule 33 allows defendants to file motions seeking a new trial, it places significant limits on their ability to do so. It requires defendants to file most motions within fourteen days of a verdict and motions based on newly discovered evidence within 120 days. Crim.R.33(A), (B). As used in Criminal Rule 33, "newly discovered" evidence is evidence of which the defendant was unaware and which "could not with reasonable diligence have discovered and produced at the trial." Crim.R.33(A)(6); *see also State v. Bethel*, 167 Ohio St. 3d 362, 2022-Ohio-783 ¶21(citing *State v. Harrison*, 2018-Ohio-1396 ¶6 (8th Dist.) (Stewart, J.)).

A defendant who discovers new evidence after the 120-day window may seek relief under Criminal Rule 33 as well, but must first seek leave to file a motion for a new trial. *See State v. Dawson*, 89 Ohio St.3d 1208, 1209–10 (2000) (Lundberg Stratton, J., concurring). To obtain leave, Rule 33(B) requires a defendant to demonstrate by clear and convincing proof that he was unable to satisfy the Rule's 120-day deadline because he

was "unavoidably prevented from the discovery of the evidence upon which he must rely." Crim.R.33(B). Once granted leave, a defendant must file a motion for a new trial within seven days. *Id.* Just like the decision about whether to grant a motion for a new trial, *see State v. Lopa*, 96 Ohio St. 410, 411 (1971); *State v. Williams*, 43 Ohio St. 2d 88, syl.2 (1975), the decision about whether to grant a motion for leave is committed to a trial court's discretion, *State v. Schiebel*, 55 Ohio St. 3d 71, syl.1 (1990); *see also State v. Davis*, 2013-Ohio-846 ¶6 (9th Dist.).

Trial courts do not need to hold a hearing on every request for leave to file a motion for a new trial. They have the discretion to deny a motion for leave without a hearing if a defendant does not submit new evidence such as "documents which, on their face, support his claim that he was unavoidably prevented from timely discovering the evidence at issue." *State v. Cleveland*, 2009-Ohio-397 ¶54 (9th Dist.); *see also State v. Smith*, 2020-Ohio-6718 ¶¶16–17 (1st Dist.); *State v. Derrick*, 2023-Ohio-1686 ¶23 (2d Dist.); *State v. Bender*, 2023-Ohio-1531 ¶10 (3d Dist.); *State v. Jewett*, 2023-Ohio-969 ¶19 (4th Dist.); *State v. Barnes*, 2018-Ohio-1585 ¶38 (5th Dist.); *State v. Peals*, 2010-Ohio-5893 ¶23 (6th Dist.); *State v. Johnson*, 2023-Ohio-918 ¶21 (7th Dist.); *State v. Briscoe*, 2021-Ohio-4317 ¶22 (8th Dist.); *State v. Sevilla*, 2023-Ohio-1726 ¶7 (10th Dist.); *State v. O'Neil*, 2023-Ohio-1089 ¶32 (11th Dist.); *State v. Kirby*, 2022-Ohio-4447 ¶10 (12th Dist.).

The Court has never specifically addressed what constitutes "new" evidence for purposes of Criminal Rule 33. But it has indicated more generally that evidence will not

support a new-trial motion if it is merely "impeaching [or] cumulative in character." *See State v. Petro*, 148 Ohio St. 505, 508 (1947). Even though the full *Petro* test does not apply to motions for leave to file a motion for a new trial, *see State v. Hatton*, 169 Ohio St. 3d 446, 2022-Ohio-3991 ¶33, lower courts have looked to *Petro*'s "impeaching or cumulative" language when determining whether a defendant has even presented any new evidence at all, *see, e.g., State v. Graggs*, 2022-Ohio-3407 ¶49 (10th Dist.); *State v. Prade*, 2018-Ohio-3551 ¶52 (9th Dist.).

Cumulative evidence "is additional evidence of the same kind to the same point." *See Kroger v. Ryan*, 83 Ohio St. 299, syl. ¶1 (1911). Where "evidence offered on a motion for new trial is merely additional upon the same point upon which evidence was given by the party at the trial, such evidence will be rejected as cumulative." *Cf. id.* (rejecting a motion for a new trial in a civil case). The same rule applies to evidence that could have been presented at trial but was not. Affidavits of experts who could have been called at trial, for example, are cumulative if they "seek[] to 'bolster' the strategy/argument by counsel at trial." *Graggs*, 2022-Ohio-3407 at ¶49.

Grad did not present any new evidence in support of his motion. Grad attached to his motion affidavits from two separate experts, along with scientific studies that were authored by those same experts and that were published in 2021, 2019, 2017, and 2016. *See* Motion for Leave, R.3, Ex.A(1), Ex.B(1), Ex.A(2), & Ex.A(3). But that evidence was

cumulative not only to evidence that Grad *could* have presented at trial but to evidence that Grad *did* present in connection with the petition for postconviction relief.

The experts who authored the affidavits that Grad attached to his petition, for example, were available to Grad before trial—he simply chose not to call them. That much is clear from the face of the affidavits. Both experts stated in their affidavits that they previously drafted expert reports in this case, and that their previous conclusions "have been only confirmed" by more recent scientific developments. *See* Motion for Leave, R.3, Ex.A at 4 & Ex.B at 5. But if the scientific studies that Grad now cites "only confirm" the conclusions that the experts had previously reached, then the experts' testimony was previously available to Grad and is not new evidence.

Grad has in fact previously acknowledged that the same type of evidence that he now seeks to classify as "new" was available to him at the time of trial. After the trial court denied Grad's 2016 petition for postconviction relief, he argued on appeal that his trial counsel was ineffective for not calling the "multiple experts" who "were available *and known to counsel* prior to the commencement of trial." *See* Grad Reply Br. at 4 (emphasis added), *State v. Grad*, 9th Dist. Case No. Case No. 17-CA-0004-M *available at* https://perma.cc/J3BC-KND4; *see also State v. Grad*, 2017-Ohio-8778 ¶3. Those experts included the same two experts who provided the affidavits on which Grad relies in this case and the testimony that those experts could have provided at trial is largely the same

as the testimony that they have provided now. *See* Grad Reply Br. at 9, *State v. Grad*, Case No. 17-CA-0004-M; *see also* Jan. 18, 2022 Journal Entry, R.10 at 2.

Grad argued in support of postconviction petition, for example, that Dr. Holick, "was consulted by [Grad's] family before trial, but not called by counsel." Grad Memorandum in Support of Jurisdiction at 9, *State v. Grad*, Supreme Court of Ohio Case No. 2018-0277; Grad Apt. Br. at 31, *State v. Grad*, 9th Dist. Case No. 17-CA-0004-M. According to Grad, had Dr. Holick been called to testify at trial he would have testified that a vitamin D deficiency or a genetic disorder such as Ehlers-Danlos syndrome or hypermobility could have been the cause of W.G's injuries. *See* Grad Memorandum in Support of Jurisdiction at 10. There is little difference between that testimony and the testimony that Dr. Holick has provided in the affidavit that he submitted in this case; he again asserts that it was not possible to "rule[] out Vitamin D deficiency or other metabolic bone disease as a cause of W.G.'s injuries." *See* Motion for Leave, R.3 Ex.A at 4.

The assertions in Dr. Ayoub's current affidavit are also the same as the testimony that Grad previously argued Dr. Ayoub could have offered at trial. Grad argued in his postconviction proceeding that Dr. Ayoub "completed a report on the bone injuries to W.G." on February 10, 2009, that his findings "were not consistent with child abuse," and that he had concluded that W.G. displayed "unequivocal signs of metabolic bone disease." Memorandum in Support of Jurisdiction at 8. As with Dr. Holick, that testimony is effectively the same as the testimony provided in Dr. Ayoub's current affidavit. *See*

Motion for Leave, R.3 Ex.B (averring that the trial testimony of one of the State's experts was wrong).

The fact that Grad has already acknowledged that scientific evidence about the possible causes of W.G.'s injuries was available before his trial began was reason enough for the trial court to deny Grad's motion for leave to file a motion for a new trial without holding a hearing. But even without those admissions, the evidence that Grad attached to his motion still would not have qualified as "new" evidence for purposes of Rule 33. Scientific studies like the ones that Grad attached to his motion for leave are not new evidence. Because they merely provide "additional [evidence] upon the same point" as evidence that could have been admitted at trial, the scientific articles Grad attached to his motion for leave are cumulative, not new, evidence. *See Kroger*, 83 Ohio St. 299 at syl.1. That is particularly true here, in light of the fact that the authors of the attached articles included some of the same experts that Grad chose not to call at trial. *See* Motion for Leave, R.3 at Ex.A(1), Ex.B(1), Ex.A(2), & Ex.A(3).

It does not matter that the articles on which Grad relies were published after his trial was over. Newly published scientific articles do not qualify as new evidence when those articles rely on "scientific theories" that "have existed for decades." *O'Neil*, 2023-Ohio-1089 ¶25. As long as "there was nothing to prevent [a defendant] from discovering and producing for trial other similar opinions and studies," a newly published study will not qualify as new evidence for purposes of Rule 33. *Prade*, 2018-Ohio-3551 at ¶54. To

hold otherwise would destroy any sense of finality with respect to criminal convictions. Science is constantly evolving and a "case cannot be retried based on every 'advancement' in scientific research." *State v. Gillispie* ("*Gillispie I*"), 2009-Ohio-3640 ¶148 (2d. Dist.).

Courts from around the country have reached the same conclusion. The Florida Supreme Court, for example, has held that "new research studies are not recognized as newly discovered evidence." *Foster v. State*, 132 So. 3d 40, 72 (Fla. 2013). Courts in Massachusetts, Arizona, and Virginia have reached a similar conclusion; they have held that scientific studies are not new evidence if they are cumulative to "to expert testimony that was or could have been presented at trial." *Commonwealth v. LeFave*, 430 Mass. 169, 180–81 (1999); *see also State v. King*, 250 Ariz. 433 ¶¶31–36 (Ariz. Ct. App. 2021);; *Jones v. Edmonds*, No. 7:19-cv-796, 2020 WL 5880726 *7 (W.D. Va. Oct. 2, 2020). Like Ohio courts, courts in those states have concluded that treating newly published scientific articles as new evidence "would provide convicted defendants with a new trial whenever they could find a credible expert with new research results supporting claims that the defendant made or could have made at trial." *LeFave*, 430 Mass. at 181; *see also Gillispie I*, 2009-Ohio-3640 at ¶148 (quoting *LeFave*).

This case shows why such concerns about finality are well-founded. Grad, in his motion for leave, pointed to scientific articles published in 2016, 2017, 2019, 2021. But if Grad is right that any scientific article published after trial qualifies as new evidence for

purposes of Criminal Rule 33, then he could have filed four motions for leave in this case—one after each article was published. And even if the trial court ultimately denied those motions, Grad's rule would have still required the trial court to at least hold a hearing on each one.

II. Grad cannot show that the trial abused its discretion when it denied his motion for leave.

None of Grad's arguments about why the trial court abused its discretion are persuasive. The cases that he cites do not hold that newly published scientific articles are, by themselves, new evidence sufficient to require a new trial. And none of Grad's other arguments offer any persuasive reason to conclude that the trial court abused its discretion when it denied his motion for leave.

Begin with the handful of cases that Grad cites. None of them held that newly published articles or additional expert testimony are, by themselves, new evidence that will entitle a defendant to a new trial. One did not involve a motion for a new trial at all. *See State v. Woodson*, 2005-Ohio-5691 (8th Dist.). Another held that evidence was not newly discovered because it could have been presented at trial. *Ohio v. Chambers*, 2021-Ohio-3388 ¶21 (4th Dist.). And a third, *State v. Gillispie* ("*Gillispie II*"), 2012-Ohio-1656 (2d Dist.), which Grad cites as holding that new expert testimony qualifies as new evidence, *see* Grad Br.19–20, held no such thing. The Second District held in that case that the defendant was entitled to a new trial because of newly discovered evidence involving an alternative suspect. *Gillispie II*, 2012-Ohio-1656 at ¶1. It *rejected*, in an earlier decision,

Gillispie's argument that the expert testimony he sought to present was new evidence. *Id.* at ¶25; *Gillispie I*, 2009-Ohio-3640 at ¶154. Far from being new, the Second District concluded, the expert evidence Gillispie sought to present simply "put a fresh coat of paint on issues that have been fully litigated." *Gillispie I*, 2009-Ohio-3640 at ¶146.

The Tenth District's decision in *State v. Butts*, 2023-Ohio-2670 (10th Dist.) does not help Grad either. The court in that case denied the State's motion for leave to appeal a trial court's order that granted Butts a new trial on the basis of newly discovered evidence. *Id.* at ¶1. The Tenth District held that an appeal was not appropriate because the State "failed to sufficiently demonstrate a probability that the trial court abused its discretion." *Id.* at ¶101. At issue in *Butts* was new scientific evidence that, the Tenth District concluded, represented a "quantum leap in the mainstream medical community's understanding" and transformed what had been a "fringe theory" at trial into a topic of legitimate debate. *See id.* at ¶¶50, 57, 70, 80, 90–91. The significance of that change, the Tenth District held, distinguished *Butts* from the many cases that had rejected new-trial requests premised on allegedly new scientific evidence. *Id.* at ¶69. It is also what distinguishes *Butts* from this case. Grad's own experts have effectively acknowledged that there has been no dramatic revolution in the relevant science. In the affidavits that they submitted in this case, the experts averred that the new studies that they authored, and on which Grad now relies, "only confirmed" opinions that they already held years ago. *See* Motion for Leave, R.3, Ex.A at 4 & Ex.B at 5.

There are several other reasons why *Butts* is of little relevance here. The procedural posture is different, for one. In this case, unlike in *Butts*, the trial court denied Grad's motion for leave to file a motion for a new trial. As *Butts* noted, that difference is meaningful. *Id.* at ¶83. Decisions about whether to grant a motion for leave are reviewed for an abuse of discretion. *Id.* That difficult-to-meet standard was one the Tenth District held the State could not overcome in *Butts* and it is one that Grad cannot overcome here. *See id.* There is also reason to question the basis for the Tenth District's decision in *Butts*; it is not clear that the "quantum leap" that the Tenth District perceived in that case actually exists. Among other things, the same scientific evidence on which the Tenth District relied *rejected* the idea that there had been a wholesale change in the relevant science. The American Academy of Pediatrics statement that the Tenth District cited as proof of a "significant jump[]" in the medical community's knowledge, *see id.* at ¶¶50–52, 69, criticized defense arguments that offered "scientific-sounding critique[s]" of child-abuse diagnoses in "sensationalized" attempts "to create the appearance of a 'medical controversy' where there is none," *see Chambers*, 2021-Ohio-3388 at ¶16 n.3 (quoting *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, Pediatric Radiology (2018) *available at* https://perma.cc/C94C-MEK2). Another journal sounded a similar theme when noting that a change in terminology from "shaken baby syndrome" to "abusive head trauma" was "misinterpreted by some in the legal and medical communities as an indication of some doubt in or invalidation of the diagnosis and the mechanism of shaking as a cause

of injury." Sandeep K. Narang, et al., *Abusive Head Trauma in Infants and Children*, 145 Pediatrics 4 (2020) *available at* https://perma.cc/SW7M-9F77. The Court need not address whether the Tenth District properly interpreted the scientific evidence at issue in *Butts*, however. It is enough to note that this case does not involve the type of "quantum leap" in scientific understanding that the Tenth District at least *believed* existed in that case.

None of the three out-of-state cases that Grad cites support his argument either. The Massachusetts Supreme Court in *Commonwealth v. Epps*, for example, confronted a defendant who *either* had received ineffective assistance of counsel because his trial attorneys failed to obtain an expert to testify on his behalf, *or* had shown that the relevant science had changed so much that exonerating expert testimony constituted new evidence that had been previously unavailable. 474 Mass. 743, 766–67 (2016). But while the Massachusetts court ordered that the defendant receive a new trial, it did not offer a single explanation for doing so. It concluded that its "touchstone" was "to do justice" and that justice required that the defendant receive a new trial, regardless of the reason. *Id.* at 765. In the course of doing so, the court emphasized the unique disposition of the case and reaffirmed that additional scientific studies that simply bolster existing expert opinions "generally would not be enough alone to justify a new trial." *Id.*

Grad's two remaining out-of-state cases are equally irrelevant. The expert testimony at issue in *People v. Miller* qualified as new because it would have been inadmissible at the time of trial under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

See No. 346321, 2020 WL 4554873 (Mich. Ct. App. Aug. 6, 2020). There is no question about the admissibility of the evidence in this case, however. And *State v. Edmunds*, involved evidence that was "not merely cumulative" to evidence that could have been presented at trial. 308 Wis. 2d 374, 386 (Wis. Ct. App. 2008); *see also State v. Hancock*, 405 Wis. 2d 400, 2022 WL 16847258 *16 (Wis. Ct. App. 2022) (*Edmunds* involved a medical debate that "emerged since trial"). The evidence in this case, by comparison, *was* cumulative. The expert affidavits Grad submitted were "premised on the same theories upon which the State's expert was cross-examined." App.Op.¶11.

Grad's remaining evidence is of even less help to him than the cases that he cites; that evidence is either not new or not evidence at all. For example, Grad alleges that he had rickets and bowed legs as a child. Grad Br.6. But the fact that Grad had a childhood disease decades before trial is not new evidence. It is information that Grad has known for years. "It would work havoc on the system if [the Court] held that information possessed by the defendant during the trial is 'newly-discovered' when revealed by him after the trial." *King*, 250 Ariz. 433 ¶44(quotation omitted). The availability of different types of genetic tests, or the fact that the cost of genetic testing has decreased since Grad's trial in 2014, by comparison, is not even evidence at all. Evidence is "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact." "Evidence," *Black's Law Dictionary* 697 (11th ed. 2019). The mere fact

that a test exists is not evidence—it does not tend to prove or disprove the existence of any fact.

If W.G. had been tested and found to have a previously undiagnosed genetic disease, then the *results* of such testing might qualify as new evidence. But whether W.G. should have been tested for additional medical conditions is not a question that is now before the Court. Grad asked to have additional tests on W.G. done before trial and the trial court denied his requests. *See* Grad Reply Br. at 7, *State v. Grad*, 9th Dist. Case No. 22CA0011-M. Grad's opportunity to challenge the trial court's denials was on direct appeal, not now, almost a decade after a jury convicted him.

Grad also complains that the court of appeals in this case "skipped directly to the merits analysis" when it affirmed denial of his motion for leave to file a motion for a new trial. He is wrong. As Grad himself notes, the Ninth District affirmed the trial court's denial of Grad's motion for leave because it concluded that the evidence Grad sought to present was cumulative to evidence that was "utilized by the defense during the course of trial." Grad Br.18 (quoting App.Op.¶10). It held, in other words, that Grad's evidence was not new. That is the same analysis that this Court has held that courts must perform when faced with a motion for leave to file a motion for a new trial, *see Bethel*, 167 Ohio St. 3d 362 at ¶41; *Hatton*, 169 Ohio St. 3d 446 at ¶30, and it is the same analysis that the Second, Tenth, and Eleventh Districts performed in the cases that Grad cites, *see* Grad Br.18.

It is Grad, not the lower courts, whose analysis is flawed. Grad spends considerable time rehashing his cross-examination of Dr. Steiner, one of the several experts that testified on behalf of the State at trial. *See* Grad Br.5–13. It is not clear why. For the purposes of this case, the only relevant question is whether Grad presented sufficient new evidence in support of his motion for leave to warrant a hearing on that motion. Grad's selective quotations from the trial transcript provide no help in answering that question. Grad also faults the State for failing to "present rebuttal expert testimony" in response to his motion for leave to file a motion for a new trial. Grad Br.17. But again, Grad is asking the wrong question. Rebuttal expert testimony may or may not be helpful when deciding whether Grad's allegedly "new" evidence was material to his defense (a question relevant to the merits of a Criminal Rule 33 motion), but it says nothing about whether the evidence that Grad sought to present was in fact new (a question relevant to whether a defendant should be permitted to file an untimely Rule 33 motion).

Finally, Grad's amicus seeks to litigate a question other than the one that is actually presented here. The amicus raises the possibility that "new scientific discoveries" not previously recognized by the law might fundamentally change the basis for a conviction. Amicus Br.5–6. But as discussed above, there are no previously unrecognized scientific discoveries at issue in this case. As amicus acknowledges, the scientific theories that formed the basis for Grad's motion for leave to file a motion for a new trial "existed at the time of Mr. Grad's conviction." *Id.* at 17. They were not therefore the type of

"revolutionary changes in human understanding" with which amicus is concerned. *See id.* at 19 (quotation omitted). The Court can affirm the decision below without holding that new scientific discoveries can *never* provide the basis for a motion for a new trial. It is enough to say that newly published scientific articles do not constitute "newly discovered evidence" for the purposes of Criminal Rule 33 when, as here, the conclusions of those articles was known at the time of trial. That is all that the Ninth District held below. *See* App.Op.¶¶11–12. The Court should do the same.

CONCLUSION

The Court should affirm the judgment of the Ninth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 24th day of October, 2023, by e-mail on the following:

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