

NO.

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 102618 and 102698

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STATE OF OHIO  
Plaintiff-Appellant

-vs-

ANTHONY APANOVITCH  
Defendant-Appellee

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**EMERGENCY MOTION TO STAY IN ADVANCE OF MEMORANDUM IN SUPPORT  
OF JURISDICITON**

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**EMERGENCY MOTION TO STAY IN ADVANCE OF MEMORANDUM IN  
SUPPORT OF JURISDICTION**

**I. Introduction**

Mary Ann Flynn was found dead on August 24, 1984. She was naked, battered and left face down with her hands tied behind her back. Sperm was pooled in her mouth. DNA testing confirmed that that sperm was Anthony Apanovitch's. After 30 years of postconviction litigation, the trial court granted a new trial and entered acquittal on one count of rape. On May 5, 2015, the Eighth District Court of Appeals affirmed the trial court's decision to grant a new trial to Anthony Apanovitch and remove him from death row. *State v. Apanovitch*, 8<sup>th</sup> Dist. Nos. 102618, 102698, 2016-Ohio-2831.

During the pendency of the appeal of the trial court's grant of a new trial, the Eighth District Court of Appeals granted the State's Motion for Emergency Stay. Pursuant to S.Ct.Prac.R. 7.01(A)(3), Appellant-State of Ohio hereby seeks an emergency order to grant an immediate stay of the court of appeals' judgment that is being appealed and to continue the stay on the low bond set by the trial court.

The State files this request for stay without the accompanying memorandum in support of jurisdiction. Apanovitch was only able to obtain a new trial by the trial and appellate courts ignoring the very evidence that the Sixth Circuit deemed the most damaging evidence to Apanovitch's claims of innocence: that the sperm found in Mary Ann Flynn's lifeless body was Anthony Apanovitch's. Apanovitch's pursuit of justice perverts the truth by focusing only on evidence helpful to his cause and ignores the existence of his own DNA. The weight of the evidence against Apanovitch demands that the State ask this Court to stay all proceedings, including the trial court's order to set bond at \$100,000 in this capital case, an amount which pales in comparison to all other capital defendants in this State.

Pursuant to S.Ct.Prac.R. 7.01(A)(3), Appellant-State of Ohio hereby seeks from this Court an immediate stay of the court of appeals' judgment that is being appealed, and the State files this request for stay without the accompanying memorandum in support of jurisdiction, which will be filed in accordance with the rules. The State moves this Court to Stay all proceedings and prohibit the trial court from granting bond in this matter pending this Court's review of the State's appeal.

## **II. Summary of Case and Proceedings**

On October 2, 1984, Anthony Apanovitch was indicted by the Cuyahoga County Grand Jury for aggravated murder in violation of R.C. 2903.01, with two aggravating circumstances (rape and burglary), aggravated burglary in violation of R.C. 2911.11, with an aggravated felony specification, and two counts of rape in violation of R.C. 2907.02, with an aggravated felony specification. A jury trial was held. On December 14, 1984 the jury returned a verdict of guilty on all counts. The jury recommended the death sentence, and on January 8, 1985, the trial court concurred with the jury and sentenced Apanovitch to death.

The Eighth District Court of Appeals affirmed Apanovitch's conviction on direct appeal. *State v. Apanovitch*, 8th Dist. Cuyahoga No. 49772, 1986 WL 9503 (Aug. 26, 1986). Apanovitch then appealed to this Court, which also affirmed his conviction and sentence of death. *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987). In the years that followed, Apanovitch filed repeated post-conviction petitions and pursued habeas relief in the federal courts. *State v. Apanovitch*, 70 Ohio App.3d 758, 591 N.E.2d 1374 (Ohio Ct.App.1991); *State v. Apanovitch*, 61 Ohio St.3d 1418, 574 N.E.2d 1089 (Ohio 1991); *State v. Apanovitch*, 107 Ohio App.3d 82, 667 N.E.2d 1041 (Ohio Ct.App.1995); *State v. Apanovitch*, 113 Ohio App.3d 591, 681 N.E.2d 961 (Ohio Ct.App.1996); *Apanovitch v. Houk*, 466 F.3d 460, 469 (6th Cir.2006). Every court to have considered Apanovitch's case affirmed his convictions and death sentence.

Apanovitch received additional discovery during habeas proceedings and raised various due process violations. “Arguing that this new evidence supported the Brady claims he made in his petition, [Petitioner] moved the district court to include it in the record. Without addressing the issue, the district court dismissed [Petitioner’s] habeas petition in 1993.” *Apanovitch v. Bobby*, 648 F.3d 434, 436 (6th Cir.2011).

Apanovitch appealed, and the Sixth Circuit, in part, reversed the district court’s 1993 judgment. “The panel held that [Petitioner] established, as to three of his Brady claims, that the prosecution had withheld favorable evidence, and remanded the district court to consider the question of prejudice in light of the new evidence. In addition, the panel ordered that the district court consider newly available DNA evidence in light of [Petitioner’s] remaining claims of actual innocence.” *Id.* at 435. The Sixth Circuit remanded Apanovitch’s case to the district court to consider three Brady violations: (1) a document in which a trial witness was quoted as having made a statement which was different than what the witness testified to at trial, (2) evidence concerning a single unidentified hair found on the victim’s body, and (3) evidence that the victim shared the same blood type as Apanovitch.

“On remand, the district court ordered the DNA testing and, after considering its result, again dismissed [Petitioner’s] petition.” *Id.* “The district court considered the new DNA evidence, which was highly inculpatory, to hold that [Petitioner] was not prejudiced under Brady, and, in the alternative, reached the same conclusion without considering the new DNA evidence.” *Id.*, citing *Apanovitch v. Houk*, N.D.Ohio No. 1:91CV2221, 2009 WL 3378250 (Aug. 14, 2009) at \*12-\*13. Furthermore, the district court addressed the chain of custody regarding the disputed “trace evidence swabs” that are the topic of the instant appeal and found that there was “a reasonable probability that the chain of custody has not been altered.” *Id.* at \*9.

Apanovitch appealed and the Sixth Circuit affirmed the federal district court. *Apanovitch v. Bobby*, 648 F.3d 434, 436 (6th Cir.2011). The Sixth Circuit found that although they previously instructed the district court to consider the newly-discovered DNA evidence (in which Apanovitch could not be excluded as the source of DNA located in the victim's mouth), the district court erred when it considered the DNA evidence as part of the prejudice analysis under Brady. *Id.* at 435. The Sixth Circuit then analyzed Apanovitch's three Brady claims without considering the DNA evidence. The Sixth Circuit found that while the three pieces of evidence were exculpatory, the prosecution's failure to disclose that evidence did not prejudice Apanovitch because the withheld evidence "does nothing to undermine the most crucial evidence against [Petitioner]." *Id.* at 442. The Supreme Court denied Apanovitch's petition for a writ of certiorari. *Apanovitch v. Bobby*, -- U.S. ---, 132 S.Ct. 1742, 182 L.Ed.2d 535 (2012).

On March 21, 2012, Apanovitch filed a fourth petition for post-conviction relief. The parties engaged in discovery, briefed what they understood to be the relevant issues, and the trial court conducted a two-day hearing where each side presented a single witness. On February 12, 2015, the trial court granted Apanovitch's petition for post-conviction relief and a motion for a new trial. The trial court set bond at \$100,000. The court of appeals granted leave for the State to appeal and granted a stay of the State's request to stay the bond.

On May 5, 2016, the Eighth District Court of Appeals affirmed the judgment of the trial court in *State v. Apanovitch*, 8th Dist. Nos. 102618, 102698, 2016-Ohio-2831. It is from that decision that the State filed its notice of appeal and with which it has filed the instant Emergency Motion to Stay in Advance of Memorandum in Support of Jurisdiction.

### III. Argument as to Why an Immediate Stay is Necessary in this Case

#### 1. The trial court admitted on the record that it did not review the evidence in this case.

On February 13, 2015, the State filed a *Motion for Reconsideration of Bond*, asking the trial court to raise Apanovitch's bond from a mere \$100,000 personal bond. In subsection 5 of that motion, the State argued that "the evidence against Apanovitch is overwhelming," and cited – among many other facts of this case – the fact that DNA testing conducted in 2007 revealed that Anthony Apanovitch could not be eliminated as the source of spermatozoa found in Mary Ann Flynn's mouth. The DNA evidence of Apanovitch's guilt was so powerful that the genetic profile shared by Apanovitch and the source of the sperm was expected to occur in only 1 out of 285 million members of the population. Both the federal district court and the Sixth Circuit discussed this fact in their opinions in Apanovitch's federal habeas proceedings. *Apanovitch v. Houk*, 2009 U.S. Dist. LEXIS 103985, 8-9 (N.D. Ohio Aug. 14, 2009); *Apanovitch v. Bobby*, 648 F.3d 434, 436 (6th Cir.2011). It is unquestionably a part of the record in this case.

On February 17, 2015, the parties appeared before the trial court for a pretrial. At that time, the trial court made it clear that it was unaware that Apanovitch's DNA was found in the victim's mouth, and actually accused the State of withholding that evidence:

THE COURT: I am a little bit curious, maybe the prosecutor's office can help me out, there were two articles, there was an article and a report over the weekend on WKYC where the statement, first of all, was made in The Plain Dealer article that the prosecutor's office said initial DNA tests proved that Apanovitch was the killer; a subsequent test was inconclusive. Since his conviction, DNA testing was perfected and proved that the jury was absolutely right all along by the odds of 1 in 285 million Caucasians that Apanovitch committed these crimes, the prosecutor said. That's basically echoed, once again, on videotape and WKYC. **I'm curious, first of all, is the prosecutor's office withholding information in this case?**

MS. MULLIN: No, I don't believe so, Your Honor.

THE COURT: Now, I presided over a hearing we had set aside up to three days; that hearing went for two days. During those two days, I heard from Dr. Richard

Staub, for the defendant, and Dr. Elizabeth Benzinger, for the state. Staub is S T A U B, Benzinger is B E N Z I N G E R. During that testimony, and I have kept my notes and if necessary, I'll be happy to get the transcript transcribed at the state's cost, Dr. Staub testified that Mr. Apanovitch was excluded in this case. Dr. Benzinger offered no opinions. So I'm curious to how these kinds of statements can be presented to the press and in your brief you filed this morning without any such evidence having been presented before the Court.

MS. MULLIN: Well, I have to disagree with you on that, Your Honor. I believe that the evidence during the hearing, which was limited solely to the retested slides, excludes the evidence that we previously discussed from Dr. Blake, which we did not make an issue during this hearing.

THE COURT: You waived Dr. Blake.

MS. MULLIN: We waived Dr. Blake for the purposes of the hearing.

THE COURT: So how can I rule on evidence not put before me?

(Tr. 5-7) (emphasis added).

But the evidence *was* before the trial court. The federal courts that affirmed Apanovitch's convictions discussed the DNA evidence extensively in their written opinions. All the trial court had to do was read those opinions. And when the State attempted to point that out, the trial court indicated that it was unaware that the federal courts had discussed this fact:

MS. MULLIN: The material he referenced was clearly contained within the 6th Circuit opinion, which is a publicized opinion.

THE COURT: You're saying that Judge Adams' opinion states that?

MS. MULLIN: Yes. Judge Adams' opinion states those references –

THE COURT: It seems to me that some sort of retraction should be made in the media and at least an apology to this Court for that kind of misstatement. I think the record ought to be set straight.

(Tr. 14).

The trial court's line of questioning reveals its fundamental misunderstanding of post-conviction proceedings. The trial court appears to have made its decision under the mistaken belief

that it could only consider the minute percentage of the evidence in the 30-year history of this case that the parties presented to it at the post-conviction hearing. This is wrong.

R.C. 2953.21(A)(1) *requires* the trial court to review any post-verdict DNA testing results "in the context of and upon consideration of all available admissible evidence related to the person's case." This is true regardless of whether the State re-introduces the same evidence again at the post-conviction hearing. But as the trial court made explicit at the February 17 hearing, it ignored the statute just as it ignored the evidence.

Moreover, the State referenced the 1 in 285 million statistic in its post-conviction pleadings in the trial court. The State quoted the Sixth Circuit and district court's discussion of the DNA in Mary Ann Flynn's mouth. *See State's Brief in Opposition to Defendant's Petition for Post-Conviction Relief*, filed July 30, 2012, at 6-7. The State's brief continued:

In 2007, FSA received a reference DNA sample from Petitioner. At that time, Petitioner's DNA was compared with the DNA of the unknown male that was referenced in the 2006 report. FSA found that Petitioner could not be excluded as the source of the DNA and that the genetic profile shared between Petitioner compared to that of the unknown male is expected to occur in 1 out of every 285 million members of the population.

*Id.* at 12.

The State thus did place this evidence before the trial court in its pleadings. And the trial court issued multiple journal entries indicating that it was aware of the status of Dr. Blake's testimony. *See* Journal entries of 4/1/2013, 4/18/2013, 7/9/2013, 7/26/2013, 8/1/2014.

The trial court's failure to review the most crucial evidence in this case is even more egregious in light of the trial court's own admission that the DNA in the victim's mouth "could be very vital evidence." (Tr. 9). Indeed, it is. And the trial court should have considered that evidence before ruling. This was not discretionary; it was *required*. It is absolutely unconscionable for a judge to overturn a jury's verdict and take a man off death row without even reading the prior

binding decisions of federal courts in this case and without knowing that Apanovitch's semen was in Mary Ann Flynn's mouth. Similarly, the Eighth District Court of Appeals opinion in this case does not address the most telling evidence of Apanovitch's guilt. Rather, the opinion reviews the trial court's order with the same blinders worn by the trial court.

**2. The Bond Schedule for Cuyahoga County judges establishes that judges should “remand” defendants facing the death penalty.**

Finally, the trial court's decision to set bond at just \$100,000 in a death penalty case violated the court's own Bond Schedule, attached to this filing as State's Exhibit 1. That schedule establishes that trial courts should “remand” defendants facing death penalty cases. In non-capital aggravated murder cases, the minimum bond is \$100,000. And there are numerous factors in this case – Apanovitch's violent history and record as a sex offender, the brutality with which he beat, raped, strangled, mutilated, and murdered Mary Ann Flynn, and the fact that a jury already found him guilty by proof beyond a reasonable doubt even without knowing that his DNA was in the victim's mouth – that each demand a bond far in excess of the minimum, or no bond at all.

The trial court admitted at the February 17 hearing that in granting Apanovitch a personal bond, “I may have acted prematurely in the heat of the moment.” (Tr. 17). This case has been pending for 30 years. For a convicted rapist and murderer to walk free because a judge acted prematurely in the heat of the moment makes a mockery of the justice system and belittles 30 years of law in this case. The trial court failed to give any explanation justifying the unprecedented bond it set in this case other than that it acted rashly. Even given the deficiency of evaluating the evidence in this case, the Eighth District found that the court did not abuse its discretion in varying from the bond schedule. 2016-Ohio-2831, at ¶ 70. This Court should not allow Apanovitch the ability to walk from custody on bond while facing a capital murder case – especially an aggravated

murder for which he was already convicted before reviewing the opinion of the Eighth District Court of Appeals.

**IV. Conclusion**

The State respectfully asks this Honorable Court to stay the proceedings pending its determination of jurisdiction, especially whereas here a convicted killer has been granted reprieve from death row by a judge who was unfamiliar with the facts of the case and the history of the litigation of the matter.

Respectfully Submitted,

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**SERVICE**

A copy of the foregoing has been sent this 5<sup>th</sup> day of May, 2016 via U.S. Mail to the following:

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