

NO. 2016-0696

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO
Plaintiff-Appellant

-vs-

ANTHONY APANOVITCH
Defendant-Appellee

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

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

I. Introduction

On May 6, 2016, the trial court reinstated the \$100,000 bond for Anthony Apanovitch. This decision is in contravention of an understanding of the facts of this case, the litigation in this case, and has placed the community at risk. Anthony Apanovitch is a serial sex offender and killer. The Cuyahoga County Prosecutor believes that there is a serious risk that Apanovitch will kill again if given a chance, and his motivation for flight – facing a capital murder charge that he was already convicted on – is beyond the pale. There has never been a graver danger to the community to allow Apanovitch to be free on bond.

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*, 8th Dist. Nos. 102618, 102698, 2016-Ohio-2831. Now, the trial court has granted bond to this killer.

The record in this case shows that bond should have been denied where the evidence of guilt is overwhelming and that Apanovitch has a clear history of violent criminal behavior:

- Sperm found in post-conviction DNA testing to be Apanovitch's seminal fluid was found in Flynn's mouth;
- The State offered Apanovitch the opportunity to walk out of jail and prove his innocence simply by providing his DNA. Apanovitch refused for approximately a decade and vigorously fought all efforts of the State to obtain his DNA;
- Apanovitch's DNA sample was finally obtained by court order, over his objection, at the State's request;

- Apanovitch had every reason to fight tooth and nail to prevent DNA testing that proved beyond any doubt he was the rapist and the killer;
- That DNA sample revealed that Apanovitch could not be eliminated as the source of the sperm in the victim's mouth to the probability of 1 out of 285 million members of the population;
- Six witnesses testified that the victim was afraid of Apanovitch, including a realtor the victim hired to find her a new house because "the painter" (a clear reference to Apanovitch) was sexually harassing her;
- Apanovitch told a co-worker, Dawson Goetchius, that the victim was "a real fox. I would like to get into her pants";
- Apanovitch told police his fingerprints were inside the victim's home, even though he had only painted the outside of her home;
- Mary Ann Flynn fought valiantly against her killer, before she was overpowered, hogtied, raped, beaten, and strangled, and her throat cut with a piece of wood; her body was violently and grossly bruised;
- Apanovitch's pregnant wife told police that she saw him with scratches on his face the day after the murder that were not there the day before;
- Apanovitch was convicted of another Rape in a jury trial in 1978. His conviction was reversed on a technicality unrelated to evidence of guilt. Before he could be convicted a second time, he pleaded guilty to Sexual Battery and was sentenced to prison;
- On the same day, Apanovitch pleaded no contest to counts of Aggravated Robbery in a different case;
- In 1981, Apanovitch pleaded guilty to Theft in yet another felony case;
- 11 Months after his probation expired, on August 23, 1984, Apanovitch – a serial offender who never should have been out on the streets in the first place – broke into the home of Mary Ann Flynn and viciously raped and murdered her.

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. But now, the trial court has reinstated a bond for Apanovitch, a flight risk and a serial offender. 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 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.

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.

On May 6, 2016, the trial court granted Apanovitch bond. During that hearing, the trial court admitted that it had placed the burden of proof on the State during the postconviction hearing and that it had refused to consider the testimony of the State's expert witness that the DNA found in the victim's vagina – which was the entire basis for Apanovitch's postconviction petition – could have been as much as five days old by the time of the murder. Apanovitch has never, at any point in these proceedings, disputed that fact.

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

1. When granting the motion for new trial, 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.

Moreover, the trial court has demonstrated a misunderstanding of the law of the case and how to evaluate a bond in a capital case. The legal standard for setting bail is set forth in Crim. R. 46(C), which reads:

- (C) Factors. In determining the types, amount, and conditions of bail, the court shall consider all relevant information, including but not limited to:
 - (1) The nature and circumstance of the crime charged, and specifically whether the defendant used or had access to a weapon;
 - (2) The weight of the evidence against the defendant;
 - (3) The confirmation of the defendant's identity;
 - (4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceeds or of flight to avoid prosecution;
 - (5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order.

This murder is not only significant in its brazenness, but disturbing in its brutality. Mary Ann Flynn was beaten, raped, tied, stabbed, and strangled in her own bed. And the evidence against Apanovitch was overwhelming at trial and was made even more so after DNA testing confirmed his guilt. 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 is despite the trial court's misunderstanding of the analysis to be taken when setting bond in a capital case. In 2015, the trial court stated, "I thought when people had new trials they were considered innocent until proven guilty." (Feb 17, 2015 Bond Hearing, at p. 15.) This belief is false under the law in Ohio.

As stated by the Eighth District Court of Appeals in *Ghali v. McFaul*, 8th Dist. No. 71334, 1996 Ohio App. LEXIS 4564:

We are obliged to give prima facie effect to the allegations of the indictment at this stage of the proceedings. **"In considering the seriousness of the offense charged for the purpose of fixing bail, the court must assume the truth of the allegations of the indictment." *In re Gentry* (1982), 7 Ohio App. 3d 143, 145, 454 N.E.2d 987.**

(Emphasis added.) See also, *Whitt v McFaul*, 8th Dist. No. 81469, 2002-Ohio-3648, at ¶ 9 ("Additionally, at this stage of the proceedings, this court must assume the truth of the allegations of the indictment in considering the seriousness of the offense charged for the purpose of fixing bail. *In re Gentry* (1982), 7 Ohio App.3d 143, 454 N.E.2d 987."); *Nawash v. McFaul*, 8th Dist. No. 81380, Motion No. 40026, 2002-Ohio-3645, at ¶21.

This Court should stay the grant of bond to Apanovitch and deny him 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 and revoke the trial court's grant of bond in this matter. The risk of flight and to the public is dire, especially where the trial court ordered new trial for a convicted killer who was granted reprieve from death row by a judge unfamiliar with the facts of the case, the history of the litigation of the matter, and who demonstrated

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellee was sent by regular U.S. mail or electronic service this 9th day of May, 2016 to:

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BOND GUIDELINE

There are a number of variables to consider, so the following guideline contains ranges of bonds with the lowest number being the base amount.

Aggravated Murder (Death Penalty/Capital Case):	Remand
Aggravated Murder:	\$100,000/ \$250,000/\$500,000 and up
Murder:	\$50,000 - \$100,000 and up
Manslaughter (Voluntary and Involuntary):	\$15,000/\$25,000/\$50,000 and up
Aggravated Vehicular Homicide:	\$20,000 - \$50,000 and up
Aggravated Vehicular Assault:	\$5000 - \$10,000 and up
Felonious Assault (No Contact Order):	\$5000/\$10,000/\$25,000 and up
Aggravated Assault:	\$2500 - \$25,000
Assault P.O.:	\$5000 and up
Domestic Violence (No Contact Order):	\$5000/\$10,000/\$25,000/\$100,000
(If defendant is approved for the Domestic Violence Project by the Probation Dept., will be on Court Supervised Release with a personal bond)	
Endangering Children (No Contact Order):	\$5000 and up
(If parent, did CFS remove children or approve continued custody?)	
Kidnapping (No Contact Order):	\$10,000 - \$50,000 and up
Rape (No Contact Order):	\$10,000/\$ 20,000/\$100,000 and up
Sexual Battery (No Contact Order):	\$5000/\$20,000/\$50,000
Gross Sexual Imposition (No Contact Order):	\$2500 - \$20,000.
Importuning:	\$1000/\$5000/\$10,000/\$15,000/\$20,000 and up
Compel Prostitution:	\$10,000/\$25,000/\$50,000 and up
Pander Obscenity Minor:	\$10,000 and up
Illegal Use Minor Material / Performance:	\$15,000 and up
Aggravated Arson:	\$10,000/\$100,000/\$200,000 and up
Vandalism:	\$2500 - \$20,000
Aggravated Robbery:	\$20,000 - \$100,000 and up
Robbery:	\$5000 - \$50,000
Aggravated Burglary:	\$10,000 - \$100,000
Burglary:	\$5000 - \$20,000.
Theft/RSP:	\$1000 personal; \$2500/\$5000/\$10,000 and
up	
Forgery /Utter/PBC:	see above
Misuse Credit Card:	see above
Identity Fraud:	\$5000/\$10,000/\$25,000 and up
Escape:	\$5000/\$10,000 and up
Fail to Comply:	\$5000/\$7500/\$10,000 and up
CCW:	\$2500 and up

HWWUD:

\$5000 and up

Drug Possession(depending on amt):

\$1000 personal \$2500/\$5000 and up

Drug Trafficking/Prep(depending on amt):

\$2500/\$5000/\$10,000 and up

Deception / Illegal Process:

\$1000 personal \$2500/\$5000 and up

Fail to Register:

\$10,000 and up