

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO,</b>	:	Ohio Supreme Court Case No. 16-0696
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	On appeal from Cuyahoga County Court of
	:	Appeals, Eighth Appellate District
<b>ANTHONY APANOVITCH,</b>	:	
	:	
Defendant-Appellee.	:	Court of Appeals Case No. 102618 and
	:	102698
	:	

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**APPELLEE ANTHONY APANOVITCH'S RESPONSE IN OPPOSITION TO THE  
APPELLANT STATE OF OHIO'S EMERGENCY MOTION TO STAY IN  
ADVANCE OF MEMORANDUM IN SUPPORT OF JURISDICTION**

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Defendant-Appellee Anthony Apanovitch hereby submits his response in opposition to Plaintiff-Appellant State of Ohio’s Emergency Motion to Stay in Advance of Memorandum in Support of Jurisdiction (the “Motion”). In its Motion, the State asks the Court to stay the judgment of the Court of Appeals – a judgment that *unanimously* affirmed a trial court decision based on evidence offered by the State and Mr. Apanovitch and admitted and considered by the trial court and which excluded Mr. Apanovitch from the DNA evidence found in the victim’s vagina. The State also requests the Court to “prohibit the trial court from granting bond in this matter pending this Court’s review of the State’s appeal.” As explained below, the Motion is premised on demonstrably false arguments that have been twice considered and rejected – first by the trial court and then by a unanimous Court of Appeals. The State’s recycled arguments fare no better a third time. For the reasons set forth below, Mr. Apanovitch respectfully requests that the Court deny the Motion in its entirety.

**PRELIMINARY STATEMENT**

In October 2014, the trial court held a two-day hearing on Mr. Apanovitch’s fourth Petition for Post-Conviction Relief, and subsequently accepted post-hearing briefing. On February 12, 2015, after reviewing the “extensive briefing . . . along with the entire transcript of the trial, all exhibits provided by counsel, all of the reported cases regarding [Mr. Apanovitch], and all the rulings on the three prior post-conviction petitions,” the court issued detailed Findings of Fact and Conclusions of Law. (*See* Ex. A, Findings of Fact, Conclusions of Law, and Opinion on Post-Conviction Relief, Feb. 12, 2015, at 4 (the “Trial Court Opinion”).) Based on the “uncontroverted” and “unequivocal” evidence (the trial court’s words) that Mr. Apanovitch is *excluded* as a source of the DNA present in the victim’s vagina (*id.* at 6), the trial court acquitted

Mr. Apanovitch of one count of rape, and dismissed the second rape charge (*id.* at 8). The court also granted Mr. Apanovitch a new trial, stating that “[t]he clear and convincing evidence excluding the [Defendant] from the claim of vaginal rape causes a change in the nature and type of evidence a jury would be presented in the case and could have an impact upon the consideration of the other counts and specifications.” (*Id.* at 4.) The trial court ordered Mr. Apanovitch released on a \$100,000 personal bond with conditions, and the State sought reconsideration of that decision. At a hearing on February 17, 2015, the trial court modified its bond ruling, changing the personal bond to a \$100,000 cash, surety, or property bond with house arrest and electronic (GPS) monitoring. (Ex. B, Tr. of Feb. 17, 2015 Hearing, at 353:17-23; 354:8-13.)

The State appealed and obtained a stay from the Court of Appeals. As a result, Mr. Apanovitch ***remained imprisoned for another 15 months*** while the appeal was briefed, argued and considered by the Court of Appeals.

On May 5, 2016, the Court of Appeals ***unanimously*** affirmed the trial court’s February 2015 Order, and February 17, 2015 Order of release on bond. (*See* Ex. C, the “Court of Appeals Decision”.) The Court of Appeals rejected each and every assignment of error relied on by the State, finding that “[t]he trial court therefore did not abuse its discretion in finding that the evidence presented by Apanovitch met the standard of clear and convincing evidence of actual innocence as it related to the vaginal rape,” and that “the trial court properly acquitted [Mr. Apanovitch] on one count [of rape] and dismissed on the other count.” (*Id.* at ¶¶ 68-69.) Significantly, the Court of Appeals held that “there was no abuse of discretion in the trial court’s bond determination.” (*Id.* at ¶ 70). Accordingly, after a hearing on Friday, May 6, 2016, the trial court re-affirmed its prior bond determination, and Mr. Apanovitch was released from custody on bond with the same conditions. As of the filing of the instant brief, Mr. Apanovitch

has been and remains on bond under home confinement and electronic monitoring and under court-supervised release. On Monday, May 9, 2016, Mr. Apanovitch met with his probation officer, reviewed his conditions of release, met with counsel, and then returned to his place of home confinement.

In its Motion, the State does not mention, let alone discuss, the detailed factual and legal discussion of either the trial court or the Court of Appeals. Instead, the State relies on its own false narrative completely disconnected from the actual facts of record, and makes the exact same arguments (often verbatim) that were considered and rejected by both the trial court and the Court of Appeals. The State has offered no legal basis whatsoever for this Court to issue a stay, and its arguments are just as baseless today as they were fifteen months ago when the trial court rejected them, and last week, when the Court of Appeals rejected them. Accordingly, Mr. Apanovitch respectfully requests that the Court deny the State's Motion in its entirety.

### **COUNTER STATEMENT OF FACTS**

The facts, based on the evidence of record submitted by both sides at the evidentiary hearing, tell an entirely different story than the State's false narrative.

On August 24, 1984, Mary Anne Flynn was found deceased in her second-floor bedroom. (Court of Appeals Decision at ¶2.) Within days of the murder, Cleveland police targeted Mr. Apanovitch as a potential suspect because he had painted her house, and because Ms. Flynn had expressed to a friend that she was fearful of someone who had done painting at her house. (*Id.* at ¶4-5.) Over the next several days, Mr. Apanovitch was interviewed several times by several different Cleveland police officers and detectives. (*Id.* at ¶5.) Each time, Mr. Apanovitch categorically denied any involvement in Ms. Flynn's murder. (*Id.*) In addition, Mr. Apanovitch voluntarily provided hair, saliva, and blood samples, and the police were given and tested several articles of Mr. Apanovitch's clothing. (*Id.*)

On October 2, 1984, a grand jury returned an indictment for aggravated murder, rape and burglary. (*Id.* at ¶8.) Mr. Apanovitch voluntarily surrendered the same day. Fifty-five days later, on November 26, 1984, the case went to trial. The evidence presented at trial was incredibly thin. (*Id.* at ¶4-5.) Indeed, “no bodily material was found under Flynn’s fingernails, the only blood at the scene belonged to Flynn, and no footprints were revealed.” (*Id.* at ¶7.) Moreover, “[o]ne hair was found on Flynn’s body that was identified as being inconsistent with both Flynn and the Apanovitch’s hair, and, although the police identified a number of latent fingerprints, none of them belonged to Apanovitch.” (*Id.*) Finally, several critical pieces of “evidence” on which the State relied at trial were “problematic.” (*Id.* at ¶7.) Despite this, Mr. Apanovitch was convicted and sentenced to death.<sup>1</sup>

In 1991, while collateral review was proceeding, the Cuyahoga County Coroner’s Office (“CCCO”) discovered three slides previously asserted by the State to be lost, that contained biological material that had ostensibly been taken from Ms. Flynn’s mouth and vagina during her autopsy in 1984. (*Id.* at ¶17.) In 2000 and 2001, the CCCO undertook DNA testing of those slides, as well as additional slides that had been stored in the State’s Pathology department. Despite active post-conviction litigation between the parties, the State failed to disclose to the defense, either that the CCCO had located and tested those two sets of slides, or the results of that testing. Mr. Apanovitch did not discover the existence of that testing and those results until 2008, and then only because that information was produced by the State during federal *habeas* proceedings. Although Mr. Apanovitch was still litigating claims on federal *habeas*, the district court deferred any consideration of DNA evidence until it held a chain of custody hearing. *See*,

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<sup>1</sup> In a 4-3 decision, this Court upheld the conviction and death sentence. In dissent, Justice Herbert Brown “strongly disagree[d] with the affirmation of the death sentence” given that the “evidence of guilt” was “far from overwhelming.” *State v. Apanovitch*, 33 Ohio St. 3d 19, 30 (1987) (J. Brown dissenting).

*e.g.*, *Apanovitch v. Tate*, No. 1:91-CV-2221, Doc# 135 (Order at 1) (N.D. Ohio filed Oct. 8, 2008) (“[T]he parties are instructed to confer with one and other and submit . . . dates and times . . . for a hearing on *solely* the issue of the chain of custody of the DNA”) (emphasis added). After the chain of custody hearing, the district court declined to hold a hearing on the reliability, credibility and admissibility of the putative DNA testing, and issued a final decision. *Apanovitch v. Houk*, No. 1:91-CV-2221, 2009 WL 3378250, at \*3, \*\*12-13 (N.D. Ohio Aug. 14, 2009), *cert. denied*, 132 S. Ct. 1742 (2012). Significantly, the Sixth Circuit had expressly recognized that the DNA testing had not been “subjected to appropriate evidentiary challenges”:

We suspect that the DNA evidence, should it be introduced and subjected to appropriate evidentiary challenges in court, might help resolve lingering questions of whether Apanovitch suffered actual prejudice when the state withheld the serological evidence, and whether Apanovitch’s innocence claim can be verified. We note that Apanovitch could well benefit from any ambiguity or error in the results that might lessen the exact accuracy of any hypothetical match with his own DNA. But these are issues better suited to the district court.

*Apanovitch v. Houk*, 466 F.3d 460, 489-90 (6th Cir. 2006); *see also* Court of Appeals Decision at ¶19. The district court, however, failed to hold any hearing relating to the putative DNA testing. Thus, prior to evidentiary hearings on post-conviction in the trial court below, no court had ever held a hearing on any of the DNA evidence, which the State had previously hidden from Mr. Apanovitch.

Accordingly, on March 21, 2012, Mr. Apanovitch filed a Petition for Post-Conviction Relief based on the newly-discovered DNA evidence that exonerated him. The Petition was brought under Ohio Revised Code § 2953.21(A)(1), and, by stipulation, Rule 33 of the Ohio Rules of Criminal Procedure. The trial court scheduled the matter for an evidentiary hearing.

Prior to the evidentiary hearing, Mr. Apanovitch aggressively pursued discovery of Dr. Edward Blake of Forensic Science Associates (“FSA”), the author of three reports concerning

analysis of DNA evidence. (Court of Appeals Decision at ¶22.) Dr. Blake refused to cooperate, and Mr. Apanovitch served a deposition subpoena on Dr. Blake and FSA in California. Dr. Blake responded to the subpoena by advising Mr. Apanovitch that he would consider appearing only if Mr. Apanovitch agreed to his demand for payment of substantial hourly fees and costs. (*Id.*) Although Dr. Blake was under subpoena, and Mr. Apanovitch was under no obligation to pay him more than the prescribed statutory appearance fee, counsel for Mr. Apanovitch nevertheless offered to discuss a reasonable basis for compensation in exchange for Dr. Blake's agreement to conduct a thorough search for documents responsive to the subpoena, and appear for deposition. Dr. Blake never responded to that offer, nor to any follow-up communications. Accordingly, Mr. Apanovitch took steps to enforce his subpoena in California and compel Dr. Blake's response and appearance.

When Mr. Apanovitch advised the State of his intent, the State advised through its assistant prosecutor that it intended to file a motion to quash the subpoena served on Dr. Blake and FSA. Despite counsel's repeated requests that the Prosecutor's Office do so promptly, no such motion was ever filed. This was reported to the trial court. Accordingly, on July 31, 2014, a hearing was convened with the trial court to discuss Dr. Blake's refusal to appear for deposition. At that hearing, "*the state represented that, given the problems with securing Dr. Blake, it would not be relying on him as a witness at the hearing on Apanovitch's fourth post conviction petition.*" (*Id.* at ¶23) (emphasis added). Based on the State's representation, the Court "stated its 'position that Blake's out and I'm not going to allow him to testify'." (*Id.* at ¶23; *see also* Ex. D (Tr. July 31, 2014 at 37-38).) "The defense confirmed for 'clarification, so we're all on the same page, it's not just that he won't be allowed to testify, it's that his prior reports and his prior work will not be allowed in and will not be used and relied on for any purpose'." (*Id.* at ¶23.) In response, "[t]he trial court stated that was the understanding, and the

state did not object.” (*Id.*) Leaving absolutely no room for doubt, “[i]n an order dated August 1, 2014, the court confirmed that ‘Dr. Blake will not be presented as a witness and none of his reports or findings will be admitted’.” (*Id.*) This ruling by the trial court was further memorialized by stipulation of the parties. In short, as discussed more fully below, the State’s current assertion that the trial court abused its discretion in failing to consider the untested, unvetted, and inadmissible FSA reports, is belied by the facts.

The trial court held an evidentiary hearing on October 14 and 15, 2014. Prior to the hearing, the “parties agreed on a joint set of hearing exhibits, which included the trial transcript and many of the original trial exhibits.” (*Id.* at ¶ 24.) “Two experts testified at the October 2014 hearings – Dr. Rick Staub for the defense and Dr. Elizabeth Benzinger for the state,” and “[b]oth experts testified in depth about DNA testing, the reliability of samples, and interpreting the results.” (*Id.*) After hearing the testimony, the Court issued the following Findings of Fact and Conclusions of Law:

- “The only expert opinion provided during the two-day hearing determined that Petitioner is excluded from the vaginal rape of the victim and that there was insufficient material to reach any conclusion whether Petitioner’s DNA was contained in the materials recovered from the victim’s mouth.” (Trial Court Opinion at 3.)
- “Both experts agreed that only the slide(s) with material from vaginal swabs from the victim contained enough genetic material to test and receive reliable results. The slides from oral fluids did not contain enough material for valid results.” (*Id.* at 6.)
- “Dr. Staub was the only expert asked his opinion whether the results of the DNA testing of the vaginal slide materials excluded Petitioner. It was his unequivocal opinion that the Petitioner was specifically excluded. This remains uncontroverted. That evidence meets, and exceeds, the standard of clear and convincing evidence of actual innocence as far as the vaginal rape.” (*Id.* at 6.)
- “The evidence at the hearing is substantially different than at the original trial and the earlier decision is, at least in part, clearly erroneous and would work a manifest injustice.” (*Id.* at 3.)

- “The clear and convincing evidence excluding the Petitioner from the claim of vaginal rape causes a change in the nature and type of evidence a jury would be presented in the case and could have an impact upon the consideration of the other counts and the specifications.” (*Id.* at 4.)
- “As a result of the evidence presented at [the] hearing, there has been a material change in the nature of the evidence from what was presented at trial.” (*Id.* at 6.)

Based on this “uncontroverted” and “unequivocal” evidence (*id.*), the trial court acquitted Mr. Apanovitch of vaginal rape, dismissed the other charge of rape, vacated the prior verdict in its entirety, and granted Mr. Apanovitch a new trial on the remaining counts. The trial court then ordered that Mr. Apanovitch be released on \$100,000 personal bond with house arrest, electronic monitoring, and court supervision.

The State moved to reconsider the bond ruling, making the *exact* same argument that it does now concerning the results of the untested, unverified FSA testing that the State had stipulated and agreed would not be part of the record. At a February 17, 2015 hearing, the trial court noted that the State’s public comments in the press were unsupported by the evidence, reminding the prosecutor that the State had voluntarily elected *not* to rely on FSA’s untested and unchallenged assertions:

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 . . . During that testimony . . . 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 purposes of the hearing.

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The Court: . . . Now, would you agree as a judge all I can rule upon is the evidence placed before me?

Ms. Mullin: Absolutely, Your Honor.

The Court: And you will agree that we set aside three days for the DNA hearing, correct?

Ms. Mullin: Absolutely.

The Court: And there was no limit on what could be discussed with regard to DNA testing, correct.

Ms. Mullin: Absolutely, Your Honor.

The Court: So Dr. Blake was in play; he could have been used?

Ms. Mullin: He could have been used.

The Court: You chose not to.

Ms. Mullin: We chose not to for the hearing.

(Ex. B (Tr. Feb. 17, 2015) at 341:21-344:10.) The court then noted that the State's expert at the evidentiary hearing agreed with Mr. Apanovitch's expert that no scientific conclusions could be drawn from the oral slide, tested by the CCCO, on which the State relied at the hearing. (*Id.* at 349-50.)

At this same hearing, the trial court reconsidered its previous bond ruling, and increased the bond to a \$100,000 cash, surety or property bond, with house arrest, GPS monitoring, and court-supervised release. (*Id.* at 353-54.)

The State appealed to the Cuyahoga County Court of Appeals, and obtained a stay of the trial court's bond determination pending the appeal. Mr. Apanovitch thus remained imprisoned for another 15 months while the appeal was briefed, argued, and considered by the Court of Appeals. The State's appellate briefing (as here) argued that the trial court improperly failed to adhere to the bond schedule, and "disregarded" the facts of the case.

By Order dated May 5, 2016, the Court of Appeals *unanimously* affirmed the trial court's decision, including its February 17, 2016 order of release on bond with conditions, specifically rejecting each of the two bond-related arguments made by the State in its Motion.

Specifically, the Court of Appeals “disagree[d] with the State’s contention that the trial court disregarded the facts of the case and acted as if the indictment was false,” stating:

The trial court set Apanovitch’s bond after it had conducted a two-day evidentiary hearing, had reviewed volumes of evidence, not only from the two-day hearing, but also from past proceedings, and had reviewed the numerous prior cases relating to this matter. The trial court acknowledged that it had initially “acted prematurely” and did not make a “wise decision” in setting the bond. Therefore, the court reconsidered its initial bond determination, specifically stating this is “still a capital case and while I did . . . make some decisions with regard to two counts in this case, it still leaves two very major and valid counts.”

(Court of Appeals Decision at ¶65.) The Court of Appeals also rejected the State’s argument that the amount of the bond was inappropriate:

We also note, as cited by Apanovitch, a similar case in this district in which a “low bond” was set after postconviction proceedings. Namely, in *State v. Keenan*, Cuyahoga C.P. No. CR-88-232189, the defendants were convicted of murder, sentenced to death, and granted postconviction relief after years of litigation. The trial court ordered their release on a \$5,000 personal bond for one defendant and a \$50,000 surety bond with house arrest and electronic monitoring for the other defendant.

(*Id.* at ¶66.) Accordingly, the Court of Appeals held that, based “[o]n the record before us, we do not find that the trial court abused its discretion in setting Apanovitch’s bond.” (*Id.* at ¶67.)

## ARGUMENT

Without citing a shred of legal support, the State asks 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.” (Motion at 2.) According to the State, an “immediate stay [in this case] is necessary” for two reasons: (1) the trial court “admitted on the record that it did not review the evidence in this case” (*id.* at 5); and (2) the trial court’s decision “to set bond at just \$100,000 in a death penalty case violated the court’s own Bond Schedule” (*id.* at 8). Each of those arguments is unavailing.

**A. The Trial Court Considered All Of The Evidence Introduced By The Parties.**

The State's assertion that the trial court "admittedly" failed to consider "evidence" before it is false. That argument is premised entirely on the exact same false pronouncement (already rejected by the trial court and Court of Appeals) that the trial court ignored inculpatory DNA evidence.

As explained above, neither Dr. Blake nor anyone else from FSA testified at the evidentiary hearing, no reports from FSA were introduced into evidence at the evidentiary hearing, and no other evidence from FSA or Dr. Blake was proffered by the State or accepted into evidence, much less tested in court through cross-examination or other means (unlike the DNA evidence presented to the trial court below, which was the subject of a two-day evidentiary hearing). That was because the State had stipulated and agreed, and the trial court ordered, that Dr. Blake would not testify at the hearing and none of the FSA reports could be used or relied upon. Having elected not to rely on Dr. Blake or the FSA reports at the evidentiary hearing before the trial court, the State's after-the-fact attempt to do so is constitutionally prohibited, improper and should not be allowed. (*See* Court of Appeals Decision at ¶ 43 ("we reiterate the extensive discussion that was had by the parties regarding Dr. Blake and the state's ultimate stipulation that it was not going to rely on any of Dr. Blake's findings. After such a stipulation, it would be unjust to now allow the state to reverse course".)) Indeed, to now pretend that there is some un rebutted DNA evidence that supports Mr. Apanovitch's guilt flies in the face of the "uncontroverted" evidence submitted at the evidentiary hearing. (Trial Court Opinion at 6.)

Significantly, it is also undisputed that the FSA testing has never been subjected to scientific or evidentiary scrutiny or challenge. In fact, the Sixth Circuit expressly recognized that the reports before it were not "evidence" and had not been "subjected to appropriate

evidentiary challenges.” *Apanovitch v. Houk*, 466 F.3d 460, 489-90 (6th Cir. 2006); *see also* Court of Appeals Decision at ¶19 (“On appeal to the Sixth Circuit, the court noted that the DNA evidence had *not* been ‘subjected to appropriate evidentiary challenges’”) (emphasis added). That is the reason why Mr. Apanovitch so aggressively pursued discovery relating to the FSA reports and Dr. Blake in the first place, going so far as to commence an action in California to compel Dr. Blake to appear for deposition and to obtain all of FSA’s files and documents. Before that discovery process unfolded, the State elected not to rely on Dr. Blake or FSA. The State is simply trying to rewrite history.

In that regard, the State also argues, again, relying solely on the untested and unvetted FSA Reports that were not admitted into evidence, that “[t]he 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 . . .” (Motion at 6-7). To argue that bond was improper because the trial court failed to consider something that was not part of the record by the State’s own agreement is baseless. In any event, as reflected in the trial court and Court of Appeals decisions (both of which the State ignores) the trial court conducted a detailed analysis of the evidence submitted by the parties, and all of the reported decisions involving Mr. Apanovitch. (*See, e.g.*, Trial Court Op. at 4 (“The Court has been supplied with extensive briefing all of which have been reviewed, along with the entire transcript of the trial, all exhibits provided by counsel, all of the reported cases regarding Petitioner, and all the rulings on the three prior post-conviction petitions.”); *id.* at 2-3 (listing decisions throughout the history of the case).) There simply is no merit whatsoever to the assertion that the trial court failed to consider any “evidence” submitted by the parties.

The “evidence” submitted by the parties at the evidentiary hearing was “unequivocal” and “uncontroverted”:

- “The only expert opinion provided during the two-day hearing determined that Petitioner is excluded from the vaginal rape of the victim and that there was insufficient material to reach any conclusion whether Petitioner’s DNA was contained in the materials recovered from the victim’s mouth.” (Trial Court Opinion at 3.)
- “Both experts agreed that only the slide[s] with material from vaginal swabs from the victim contained enough genetic material to test and receive reliable results. The slides from oral fluids did not contain enough material for valid results.” (*Id.* at 6.)
- “Dr. Staub was the only expert asked his opinion whether the results of the DNA testing of the vaginal slide materials excluded Petitioner. It was his unequivocal opinion that the Petitioner was specifically excluded. This remains uncontroverted. That evidence meets, and exceeds, the standard of clear and convincing evidence of actual innocence as far as the vaginal rape.” (*Id.* at 6.)

Unable to change the evidence actually presented and considered by the trial court, the

State, by its Motion, is attempting impermissibly to rely on unchallenged and unvetted documents – information that the State itself elected not to seek to introduce into evidence at the evidentiary hearing.

**B. The Trial Court’s Bond Determination Was Appropriate.**

The State’s assertion that the trial court’s bond decision “violated the court’s own Bond Schedule” (Motion at 8) is belied by the Bond Guidelines themselves. By definition, the bond “guidelines” are not “requirements.” Nor could they be. To the contrary, the Ohio Legislature has required that “[i]n determining the types, amounts, and conditions of bail, the court shall consider all relevant information . . . .” Crim. R. 46(C).<sup>2</sup>

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<sup>2</sup> The State’s assertion that there are “numerous factors” warranting a bond in excess of \$100,000 is baseless. As noted above, the trial court was fully aware of the complete factual record. The Post-Conviction Relief statute requires that the newly-discovered DNA evidence be considered in the context of all *admissible* evidence. Accordingly, the trial court was provided (and reviewed) the entire 3,000 plus page trial transcript, all prior reported decisions, and extensive presentations and briefing, both at and after the Evidentiary Hearing concerning all of the non-DNA evidence. (*See, e.g.*, Trial Court Op. at 2-3 & 4.) All the State is doing now is asking this Court to second guess the trial court’s considered judgment.

Moreover, as noted above, the Court of Appeals cited analogous situations where lower bonds were ordered, a \$5,000 personal bond and a \$50,000 surety bond with conditions for two defendants in the *Keenan* matter. (Court of Appeals Decision, ¶66.) The bond set for Mr. Apanovitch is *twenty* times the amount for one defendant, and *twice* the amount for the other, and conclusively refutes the State's assertion that a \$100,000 bond is somehow inadequate or improper.

Finally, the State's reliance on the trial court's comments that it "may have acted prematurely" in initially ordering a \$100,000 personal bond is unavailing. The State simply ignores the fact that, even assuming for the sake of argument the initial bond ruling was ill-advised, the trial court promptly modified it because, as the trial court noted, "this is still a capital case and while I did, subject to appeal, make some decisions with regard to two of the counts in the case, it still leaves two very major and valid counts." (Ex. B (Tr. at 353).) Accordingly, the court required a more onerous \$100,000 cash, surety or property bond with GPS monitoring, house arrest, and court-supervised release. (*Id.* at 354.) In other words, the court undeniably considered the gravity of the offenses alleged against Mr. Apanovitch in setting bail, and how "[t]he clear and convincing evidence excluding the [Defendant] from the claim of vaginal rape causes a change in the nature and type of evidence a jury would be presented in the case and could have an impact upon the consideration of the other counts and specification." (Trial Court Op. at 4.)

Mr. Apanovitch met the bond requirements set by the trial court. He was released from custody and remains under house arrest. Mr. Apanovitch met with his probation officer and is scheduled to meet with him again on Monday, May 16, 2016 and on other subsequent dates scheduled by the probation officer.

**CONCLUSION**

For the reasons set forth above, Defendant-Appellee respectfully requests that the Court deny the State's Motion in its entirety.

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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

STATE OF OHIO,	)	CASE NO.: CR-84-194156
	)	
Plaintiff-Respondent	)	JUDGE ROBERT C. MCCLELLAND
	)	
vs	)	
	)	
ANTHONY APANOVITCH,	)	<u>Findings of Fact, Conclusions of Law, and</u>
	)	<u>Opinion on Post Conviction Relief</u>
Defendant-Petitioner	)	

I. Findings of Fact

1. Petitioner was the subject of a secret indictment on October 2, 1984 for aggravated murder with felony murder specifications and aggravated felony specifications, aggravated burglary with aggravated felony specifications, and two counts of rape with aggravated felony specifications.
2. The two rape counts fail to specify any particulars regarding the alleged nature and type of each rape.
3. Petitioner entered a not guilty plea to all counts on October 4, 1984.
4. The trial commenced 55 days later on November 26, 1984.
5. A guilty verdict was returned on each count and specification.
6. A mitigation hearing was conducted and the jury recommended the death penalty.
7. Petitioner was sentenced to 15-25 years on counts 2, 3, and 4, to run consecutively.
8. The Court accepted the jury's recommendation and imposed the death penalty on count 1.
9. Petitioner filed a motion for acquittal or new trial and both were denied.
10. The case was appealed to the Eighth Appellate District Court of Appeals which affirmed the verdict.

11. The case was appealed to the Ohio Supreme Court which affirmed the verdict in a 4-3 decision.
12. Petitioner in June 1988 filed a petition to vacate or set aside the judgment before Judge Carl Character alleging multiple “causes of action” in support of the petition.
13. Judge Character dismissed the petition on April 7, 1989.
14. In February, 1994, Petitioner filed “First Successor Petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Sections 2953.21 and 2953.23(A),” containing additional arguments and bases in support of the petition.
15. On March 13, 1995, Judge Character dismissed the second petition.
16. On August 22, 1995, Petitioner filed the “Second Successor Petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Sections 2953.21 and 2953.23(A)” raising additional arguments in support of the petition.
17. Judge Character on November 27, 1995 dismissed the third petition.
18. There have been 9 reported cases involving this case and this Petitioner:
  - a. *State v. Apanovitch* (8/28/86) 1986 Ohio App. LEXIS 8046 (initial appeal, verdict affirmed)
  - b. *State v. Apanovitch* (10/7/87) 33 Ohio St. 3d 19 (appeal of conviction, affirmed)
  - c. *State v. Apanovitch* (2/11/91) 70 Ohio App. 3d 758 (appeal of 1<sup>st</sup> petition for post-conviction relief, dismissal affirmed)
  - d. *State v. Apanovitch* (11/9/95) 107 Ohio App. 3d 82 (appeal of 2<sup>nd</sup> petition for post-conviction relief, dismissal affirmed)
  - e. *State v. Apanovitch* (8/8/96) 113 Ohio app. 3d 591 (appeal of 3<sup>rd</sup> petition for post-conviction relief, dismissal affirmed)
  - f. *Apanovich [sic] v. Taft* (7/21/06) 2006 U.S. Dist. LEXIS 54607 (42 U.S.C. 1983 action, dismissed)
  - g. *Apanovitch v. Houk, Warden* (10/19/06) 466 F. 3d 460 (appeal of denial of habeas corpus, remand to Dist. Ct. on issue of DNA)

- h. *Apanovitch v. Houk, Warden* (8/14/09) 2009 U.S. Dist. LEXIS 103985 (DNA chain of custody); and
  - i. *Apanovitch v. Bobby, Warden* (6/8/11) 684 F. 3d 434 (affirmed denial of habeas corpus).
19. Petitioner filed his fourth post-conviction relief petition March 21, 2012, seeking relief under R.C. 2953.23 and 2953.21 based upon the DNA evidence which could be considered as a result of the ruling by Federal District Judge Adams, ruling that the chain of custody was sufficiently proven and the DNA containing materials could be tested.
  20. The parties stipulated that the Court will consider the relief requested under both the Revised Code sections and Rule 33 of the Ohio Rules of Criminal Procedure.
  21. A hearing was held commencing October 14, 2014, predominantly on the issues surrounding the DNA findings, or lack thereof, on the material discovered in the Cuyahoga County Medical Examiner's Office in the 1990's.
  22. Dr. Richard Staub testified on behalf of the Petitioner. Dr. Elizabeth Benzinger, from BCI, testified on behalf of the State.
  23. The only expert opinion provided during the two-day hearing determined that Petitioner is excluded from the vaginal rape of the victim and that there was insufficient material to reach any conclusion whether Petitioner's DNA was contained in the materials recovered from the victim's mouth.

## II. Conclusions of Law

1. The Petition is properly before the Court and is ripe for consideration.
2. R.C. 2953.21, 2953.23, and Rule 33 of the Ohio Rules of Criminal Procedure are applicable to this proceeding.
3. The Court is not bound by the principle of the "law of the case" because two exclusions apply to the facts here. The evidence at the hearing is substantially different than at the original trial and the earlier decision is, at least in part, clearly erroneous and would work a manifest injustice.
4. The indictment counts for rape and the jury instructions failed to differentiate the type or nature of the rape alleged and both counts allege two types of rape making it impossible for the trier of fact to make a clear determination of whether and which crime may have occurred.

5. The clear and convincing evidence excluding the Petitioner from the claim of vaginal rape causes a change in the nature and type of evidence a jury would be presented in the case and could have an impact upon the consideration of the other counts and the specifications.
6. Due to the limited scope of these proceedings, the Court, at this time, may not disturb the prior rulings including, but not limited to, the admission of the victim's present sense impressions, the alleged Brady violations, the difference in the statements of Detective Zalar, the testimony concerning "secretors", the testimony concerning the single hair, and the testimony of the jailhouse snitch, Howard Hammon. Those issues would be subject to challenges in a new trial.
7. The rape specification must be removed and dismissed from the first count of Aggravated Murder.

### III. Opinion

#### A. Introduction

The allegations of the crimes at issue in this case have been set forth and repeated in the various pleadings and reported cases. Petitioner was charged in a four count indictment alleging aggravated murder, aggravated burglary, and two counts of rape. The charges included specifications for consideration of the death penalty. The case arose due to the brutal murder of Mary Anne Flynn on August 23, 1984. Petitioner was indicted on October 2, 1984, pled not guilty on October 4, 1984, and was on trial 55 days later on November 26, 1984.

The entire case was based on circumstantial evidence with no physical or eyewitness evidence placing Petitioner at the crime scene. The jury returned a guilty verdict on all counts and specifications and further made a recommendation of the death penalty. That recommendation was accepted by the trial judge and Petitioner was sentenced accordingly.

Petitioner filed all appropriate appeals, pursued at least two writs for habeas corpus, and three prior post-conviction petitions, all of which resulted in denials and his sentence has remained intact. The Petitioner is now before the Court having filed a fourth post-conviction petition, this one specifically raising issues of DNA evidence alleged to be exculpatory.

The Court has been supplied with extensive briefing all of which have been reviewed, along with the entire transcript of the trial, all exhibits provided by counsel, all of the reported cases regarding Petitioner, and all the rulings on the three prior post-conviction petitions. The Court held a hearing to consider the DNA evidence and heard expert testimony from Dr. Richard Staub on behalf of the Petitioner and Dr. Elizabeth Benzinger, from BCI, on behalf of the State. (A listing of the materials reviewed, not already a part of the record is attached and each item is marked as a Court Exhibit).

## B. Law and Discussion

### 1. R.C. 2953.21, 2953.23, and Rule 33 of the Ohio Rules of Criminal Procedure Apply

R.C. 2953.23(A)(2) specifically provides that a petition for post-conviction relief is timely when it involves the testing of DNA. Petitioner could only pursue this remedy following the decision of Judge Adams which found a proper chain of custody of the DNA containing materials. Once that decision was made Petitioner filed his petition seeking various types of relief.

R.C. 2953.21 sets forth the standards to be considered by the trial court and the available means of disposition of the case. The Court must receive evidence by clear and convincing evidence of “actual innocence” of a felony offense or of the aggravating circumstances that formed a basis for a sentence of death. Actual innocence for purposes of this petition is defined in R.C. 2953.21(A)(1)(b) as, “...had the results of the DNA testing...been presented at trial... no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted...”

Further, the parties stipulated that the Court may also consider and apply Rule 33 of the Ohio Rules of Criminal Procedure, New Trial. There are 6 listed grounds for granting a new trial. Arguably, Rule 33(A)(4),(5), and (6) may be applicable. Subsection (6) is most directly on point, stating,“(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at trial...” This is precisely what has occurred here.

### 2. The “law of the case” does not apply

The Eighth Appellate Court of Appeals in *State v. Larkin*, 2006 – Ohio – 90 discusses the concept of the “law of the case” as follows:

The United States Supreme Court has stated that “law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California* (1983), 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318... The Ohio Supreme Court has interpreted the law of the case doctrine to provide that the “decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case both at trial and reviewing levels.” *Nolan v. Nolan* (1984), 11 Ohio St. 3d 1, 462 NE2d 410.

However, the appellate court in *Larkin* went on to explain the exceptions to this doctrine:

The law of the case is discretionary in application, subject to three exceptions: (1) The evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly

erroneous and would work a manifest injustice. *United States v. Becerra* (C.A. 5, 1998) 155 F. 3d 740.

See also, *Stemen v. Shibley*, 11 Ohio App 3d 263, 465 NE2d 460; *Johnson v. Morris*, 108 Ohio App 3d 343, 670 NE2d 1023; and *State ex rel Sharif v. McDonnell*, 91 Ohio St. 3d 46, 2001 – Ohio – 240, 741 NE2d 127.

As a result of the evidence presented at hearing there has been a material change in the nature of the evidence from what was presented at trial. That material difference involves the first exception to the law of the case doctrine. As a result of that first exception having been met, the third exception also applies. The new evidence shows that, at least, some portion of the prior decision was clearly erroneous and to apply the law of the case would work a manifest injustice.

This Court is not bound by the law of the case and has considered the issues presented free from any restraint which could have been imposed by that doctrine. As will be explained, below, the Court does feel restrained in some respects by the law of the case as it relates to issues outside of the DNA evidence presented.

### 3. The DNA evidence

In the 1990's slides made from bodily fluids collected from the victim were discovered in the Cuyahoga County Medical Examiner's Office (previously Cuyahoga County Coroner's Office). It was determined that these slides could potentially be tested for DNA which was not an available scientific test at the time of the trial. Following additional litigation, it was ruled that there was a proper chain of custody and whatever materials which might be contained on the slides could be tested and they were.

In October, 2014, the Court received expert testimony from Dr. Richard Staub and Dr. Elizabeth Benzinger, on behalf of the Petitioner and the State, respectively. Both experts presented a thorough and detailed explanation of DNA testing, the types of samples which can be considered reliable, and the interpretation of the results. Both experts agreed that only the slide(s) with material from vaginal swabs from the victim contained enough genetic material to test and receive reliable results. The slides from oral fluids did not contain enough material for valid results.

Dr. Staub was the only expert asked his opinion whether the results of the DNA testing of the vaginal slide materials excluded Petitioner. It was his unequivocal opinion that the Petitioner was specifically excluded. This remains uncontroverted. That evidence meets, and exceeds, the standard of clear and convincing evidence of actual innocence as far as the vaginal rape. Petitioner is acquitted of the vaginal rape.

### 4. Indictment deficiency concerning rape

The two indictments against Petitioner for rape are identical. Both allege sexual conduct with the victim, not his spouse, by purposely compelling her to submit by the use of force or threat of force, and both contain an aggravated felony specification. During the trial evidence

was offered alleging both a vaginal rape and an oral rape. There is no bill of particulars shown on the docket and there is nothing else this Court could find that provided any specificity as to which count of rape was for which conduct.

The jury instructions were reviewed to see if there was any clarification for the jury. The jury was instructed, as follows:

The defendant is charged with rape. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 23<sup>rd</sup> day of August, 1984, in Cuyahoga County, Ohio, the defendant engaged in sexual conduct with Mary Anne Flynn who was not the spouse of the defendant, and the defendant purposely compelled Mary Anne Flynn to submit by force or threat of force.

Sexual conduct means vaginal intercourse between a male and female and fellation [sic] between persons regardless of their sex. Vaginal intercourse takes place when the penis is inserted into the vagina. Fellatio means the sexual act committed with the male sex organ and the mouth.

A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant specific intention to have vaginal intercourse and/or fellatio with Mary Anne Flynn. A person acts purposely when it is his specific intention to engage in conduct of that nature. Purpose is the decision of the mind to do an act with the conscious objective of obtaining a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

The purpose with which a person does an act is determined from the manner in which it is done, the means or weapon used, and all of the facts and circumstances in evidence.

You will determine from the facts and evidence, whether or not the defendant knowingly had the purpose of mind to forcibly have vaginal intercourse and/or fellatio with Mary Anne Flynn.

Force means any violence, compulsion or constraint physically exerted by any means upon or against Mary Anne Flynn.

If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of rape, your verdict must be guilty.

If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of rape, then your verdict must be not guilty. (Transcript 2260-2262).

This jury instruction repeatedly refers to "vaginal intercourse and/or fellatio". At no point did the court distinguish in any way between the two separate counts of rape. The jury was

left with uncertainty. Were these two counts comprised of a vaginal rape and an oral rape, two vaginal rapes and/or two oral rapes. Having the current evidence excluding the Petitioner from the vaginal rape, which count or counts of rape are to be dismissed, count 3 and/or count 4?

The Sixth Circuit Court of Appeals confronted a similar circumstance in *Valentine v. Konteh* (2005) 395 F. 3d 626. In that case the defendant was charged with 20 counts of child rape and 20 counts of felonious sexual penetration and was sentenced to 40 life terms. As here, each of the 20 counts of child rape were carbon copies of each other and the same was true for the 20 counts of felonious sexual penetration.

The Sixth Circuit affirmed the trial court's ruling that the indictment charging Valentine with multiple, identical and undifferentiated counts violated his due process rights. The Sixth Circuit held that when carbon-copy indictments are used, "...the defendant has neither adequate notice to defend himself, nor sufficient protection from double jeopardy." They further held that, "...the constitutional error in this case is traceable not to the generic language of the individual counts of the indictment but the fact that there was no differentiation among the counts." The Sixth Circuit did uphold one count of child rape and one count of felonious sexual penetration and remanded the case for resentencing.

The Court is cognizant that this case was indicted over 30 years ago and the process may have proceeded in a less formal manner. That does not alleviate this Court's duty to insure the constitutional rights of the Petitioner. There is definitive exculpatory evidence with regard to the vaginal rape and there is nothing in the record to differentiate either of the rape counts. As a result, the Court acquits the Petitioner of one count of rape and dismisses the other count for its lack of specificity or differentiation from the other count in violation of Petitioners due process rights.

#### 5. New trial

Petitioner is now left with two remaining counts, one for aggravated murder with specifications and one for aggravated burglary with specifications. With the removal of the two rape counts the nature and tenor of the case changes greatly. Rule 33 of the Ohio Rules of Criminal Procedure provide that a new trial may be granted on 6 different grounds. The following apply here:

- (4) That the verdict is not sustained by sufficient evidence or is contrary to law...
- (5) Error of law occurring at trial;
- (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at trial...

Subsection (4) applies now because of the potentially material changes in how a jury might view the aggravating circumstances when considering the death penalty. With rape no longer being a part of the case it could make a difference.

Subsection (5) has already been discussed concerning the constitutional infirmity with the rape indictments and the failure to rectify that through a bill of particulars or appropriate jury instructions.

Subsection (6) obviously applies because of the DNA evidence.

The Court is making no ruling concerning the evidentiary and Brady violations repeatedly presented throughout all of the proceedings in this case. Those rulings constitute "law of the case" which may not be disturbed at this point and through this proceeding. With a new trial there will be a blank slate and all such issues will be open for discussion and debate as they may arise during the course of trial. The Petitioner is granted a new trial on the remaining counts.

#### IV. Rulings

Petitioner's fourth post-conviction petition is granted as follows:

- A. Petitioner is acquitted of one count of rape;
- B. The remaining count of rape is dismissed for violating Petitioner's due process rights due to its deficiency in both specificity and differentiation;
- C. Petitioner is granted a new trial on the counts of aggravated murder and aggravated burglary with specifications;
- D. The rape specification in the aggravated murder count is dismissed;
- E. The prior verdict is vacated pursuant to the terms of this ruling;
- F. Bond is to be set.

**IT IS SO ORDERED.**



**ROBERT C. MCCLELLAND, JUDGE**

**DATE: February 12, 2015**

**SERVICE**

A copy of the Findings of Fact, Conclusions of Law, and Opinion on Post Conviction Relief was hand delivered to all counsel involved at the hearing.

## COURT EXHIBITS

1. Parts 1 & 2 of Trial Transcript
2. Parts 3 & 4 of Trial Transcript
3. Part 5 of Trial Transcript
4. Documents for October 14-16, 2014 hearing
5. Indictment
6. Death Warrant
7. Docket

1 TUESDAY MORNING SESSION, FEBRUARY 17, 2015

2 - - - -

3 P R O C E E D I N G S

4 - - - -

5 THE COURT: We're here on  
6 case number 194156, State of Ohio versus  
7 Anthony Apanovitch. This is a pretrial. I'm  
8 doing this on the record based on the nature  
9 of this case. I believe that this should be  
10 on the record.

11 Katie Mullin and Adam Chaloupka are  
12 here on behalf of the prosecutor's office.  
13 Mark DeVan and Bill Livingston are here on  
14 behalf of Mr. Apanovitch.

15 First of all, there was discussion  
16 last week, on Thursday, that an appeal was  
17 going to be filed. I take it that no appeal  
18 has been filed to date?

19 MS. MULLIN: Your Honor, our  
20 entry will be journalized this morning, so  
21 we're going to file it as soon as we're done  
22 with this pretrial.

23 THE COURT: Very good. Is  
24 it the intention of the prosecutor's office  
25 for this case to continue as a capital case?

1 MS. MULLIN: It is, Your  
2 Honor.

3 THE COURT: Mr. DeVan, is it  
4 your intent, we talked about this on Thursday,  
5 I know we haven't had much time, for you and  
6 your team to continue representing  
7 Mr. Apanovitch?

8 MR. DEVAN: Your Honor, we  
9 have had a team conference on that and there  
10 are some decisions still to be made, but I can  
11 tell you this much, that the people from  
12 Crowell & Moring in New York, their partner,  
13 who is overseas, pro bono and public service  
14 type legal work, has indicated that he is in  
15 favor of continuing on this case in the  
16 appellate stage and perhaps even the trial  
17 matter, but a final decision has to be made in  
18 New York as to them.

19 Part of their decision -- their  
20 decision will also inform whether or not I  
21 remain on the case on the appellate matter.

22 THE COURT: Very good. It  
23 seems to me I know there's an issue about you  
24 not being on the assigned counsel list. I  
25 think that I'll look to see, if it comes up,

1 if there's an exception, it seems a little bit  
2 contrary to not have you continue based on all  
3 the work that's been done on this case.

4 MR. DEVAN: I can tell you  
5 about five years ago, Judge Timothy McMonagle  
6 had a death penalty case that he asked me to  
7 take and when I told him I wasn't on the list,  
8 the court administrator and the judge entered  
9 an order putting me on the list for the  
10 purposes of that case and when I was off of  
11 it -- when that case was resolved, then I was  
12 off the list again. There is a procedure in  
13 place for assigning people who have to be, of  
14 course, rule 10, or is it rule 20 now,  
15 certified, and I am certified.

16 THE COURT: Right.

17 MR. DEVAN: So we'll make  
18 those decisions in my office in part based on  
19 Crowell & Moring's decision and I will let the  
20 Court and my -- and the state know as to  
21 whether we are on or off.

22 THE COURT: Very good. If  
23 the decision is made for you to stay on, I'll  
24 certainly enter that same type of order that  
25 Judge McMonagle had ordered some years ago.

1 I am a little bit curious, maybe the  
2 prosecutor's office can help me out, there  
3 were two articles, there was an article and a  
4 report over the weekend on WKYC where the  
5 statement, first of all, was made in The Plain  
6 Dealer article that the prosecutor's office  
7 said initial DNA tests proved that Apanovitch  
8 was the killer; a subsequent test was  
9 inconclusive. Since his conviction, DNA  
10 testing was perfected and proved that the jury  
11 was absolutely right all along by the odds of  
12 1 in 285 million Caucasians that Apanovitch  
13 committed these crimes, the prosecutor said.  
14 That's basically echoed, once again, on  
15 videotape and WKYC.

16 I'm curious, first of all, is the  
17 prosecutor's office withholding information in  
18 this case?

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

21 THE COURT: Now, I presided  
22 over a hearing we had set aside up to three  
23 days; that hearing went for two days. During  
24 those two days, I heard from Dr. Richard  
25 Staub, for the defendant, and Dr. Elizabeth

1 Benzinger, for the state.

2 Staub is S T A U B, Benzinger is B E  
3 N Z I N G E R.

4 During that testimony, and I have  
5 kept my notes and if necessary, I'll be happy  
6 to get the transcript transcribed at the  
7 state's cost, Dr. Staub testified that  
8 Mr. Apanovitch was excluded in this case.  
9 Dr. Benzinger offered no opinions.

10 So I'm curious to how these kinds of  
11 statements can be presented to the press and  
12 in your brief you filed this morning without  
13 any such evidence having been presented before  
14 the Court.

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

22 THE COURT: You waived  
23 Dr. Blake.

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

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

3                   MS. MULLIN:                   We didn't ask  
4 you to rule on evidence not put before you.  
5 Dr. Blake is an important consideration and  
6 you have to assume the truth of the evidence  
7 when you're looking at the bond hearing and  
8 Dr. Blake --

9                   THE COURT:                   We're not  
10 talking about the bond here; we're talking  
11 about statements made about the ruling of this  
12 Court, statements made as if they were factual  
13 statements.

14                   Now, would you agree as a judge all I  
15 can rule upon is the evidence placed before  
16 me?

17                   MS. MULLIN:                   Absolutely, Your  
18 Honor.

19                   THE COURT:                   And you will  
20 agree that we set aside three days for the DNA  
21 hearing, correct?

22                   MS. MULLIN:                   Absolutely.

23                   THE COURT:                   And there was no  
24 limit on what could be discussed with regard  
25 to DNA testing, correct?

1 MS. MULLIN: Absolutely, Your  
2 Honor.

3 THE COURT: So Dr. Blake was  
4 in play; he could have been used?

5 MS. MULLIN: He could have  
6 been used.

7 THE COURT: You chose not  
8 to.

9 MS. MULLIN: We chose not to  
10 for the hearing.

11 THE COURT: So how can you  
12 then go forward, your office, and put this  
13 kind of scandalous information in the  
14 newspaper and on TV acting as if this Court  
15 had heard testimony to that effect in making  
16 its ruling?

17 MS. MULLIN: Your Honor, I  
18 did not -- I was not part of creating that  
19 statement that went to the paper, but I would  
20 say this, that the reason that I have the --  
21 Dr. Blake material listed in my bond motion is  
22 because it's relevant for the purposes of the  
23 bond motion.

24 THE COURT: I'm not talking  
25 about the bond motion. We're going to get to

1 that.

2 MS. MULLIN: Well, that's the  
3 only --

4 THE COURT: I'm asking about  
5 statements made in the public media with  
6 regard to this Court's ruling suggesting this  
7 Court ignored what could be very vital  
8 information.

9 MS. MULLIN: I don't  
10 believe -- we know, obviously, that the Court  
11 did not ignore --

12 THE COURT: This is  
13 erroneous, correct?

14 MS. MULLIN: No --

15 THE COURT: This is not  
16 information that was presented in front of  
17 this Court in an evidentiary hearing, is that  
18 correct?

19 MS. MULLIN: That was not  
20 presented in --

21 THE COURT: So this is  
22 erroneous information?

23 MS. MULLIN: It is erroneous  
24 in that context, I would agree with you, but  
25 it is not erroneous --

1 THE COURT: You would agree  
2 that Dr. Benzinger testified she had no  
3 opinion about contamination, correct?

4 MS. MULLIN: She -- we had  
5 her testimony as to the multiple instances  
6 where contamination could have occurred.

7 THE COURT: She never gave  
8 an opinion that this sample was contaminated,  
9 correct?

10 MS. MULLIN: No, she did not.

11 THE COURT: She did not give  
12 an opinion including Mr. Apanovitch in this  
13 sample, correct?

14 MS. MULLIN: I believe when  
15 she testified, she noted that if you look at  
16 the bottom slide, which was an oral slide,  
17 that many of the allele locations were those  
18 consistent with Anthony Apanovitch, and while  
19 at the time the medical --

20 THE COURT: Those were found  
21 not to be sufficient or reliable, in her  
22 opinion.

23 MS. MULLIN: By the medical  
24 examiner's office at the time not under her  
25 opinion, no. That is a fact that we contest.

1                   THE COURT:                   In fact, the  
2 bottom line is Dr. Benzinger gave absolutely  
3 no opinion in this case, correct?

4                   MS. MULLIN:                   No, she did not  
5 give an opinion in this case. She gave her --  
6 we had her review the evidence and she looked  
7 at the evidence and it appeared that  
8 Mr. Apanovitch's alleles, consistent with what  
9 we know his known profile is, was still  
10 consistent with even the retested  
11 oral slides -- was still consistent with Mr.  
12 Apanovitch's retested DNA slide, and that was  
13 the testimony Dr. Benzinger presented.

14                   THE COURT:                   So you're  
15 telling me that she gave an opinion --

16                   MS. MULLIN:                   I'm  
17 not saying --

18                   THE COURT:                   -- based upon  
19 reasonable scientific probability?

20                   MS. MULLIN:                   No, I'm not  
21 saying that she gave an opinion. I'm saying  
22 that her testimony made it indicate that  
23 Mr. Apanovitch was still even located in the  
24 retested oral slide.

25                   THE COURT:                   So her testimony

1 was it was not a sufficient sample, that it  
2 was not reliable, and that it would be  
3 entirely speculative, correct?

4 MS. MULLIN: Her testimony  
5 was that it was insufficient based on the  
6 threshold levels used by the medical  
7 examiner's office at that time.

8 THE COURT: And by her.

9 MS. MULLIN: Not by her at  
10 BCI as of now. That was not her testimony.

11 THE COURT: So the levels,  
12 you're saying, are sufficient for BCI, but you  
13 chose not to ask her that opinion?

14 MS. MULLIN: She testified to  
15 that, Your Honor. She testified to the  
16 thresholds that BCI uses now, which are lower  
17 than thresholds that were used by the medical  
18 examiner's office at that time.

19 THE COURT: My recollection  
20 is that she testified that the thresholds with  
21 regard to the samples from the mouth were  
22 insufficient under either standard and she  
23 gave absolutely no opinion based upon  
24 reasonable scientific probability as to  
25 anything in this case. Am I mistaken in that

1 regard?

2 MS. MULLIN: I believe, Your  
3 Honor, we have a disagreement on those facts,  
4 Your Honor.

5 THE COURT: Should I have  
6 the transcript prepared at the State's expense  
7 so we can identify that?

8 MS. MULLIN: I have a copy of  
9 the transcripts, Your Honor.

10 THE COURT: Then I'd be  
11 happy for you to take whatever time you need  
12 to show me where she entered an opinion where  
13 she was asked based upon -- opinion based upon  
14 scientific probability as to any of these  
15 issues.

16 MS. MULLIN: She was not  
17 asked that. She was not asked for her  
18 opinion --

19 THE COURT: So if she was  
20 not asked for any kind of an opinion based  
21 upon reasonable scientific probability, how  
22 can anybody put out in the media something  
23 that was not presented evidentiary-wise to  
24 this Court?

25 MS. MULLIN: I'm sorry, Your

1 Honor?

2 THE COURT: I mean, is the  
3 prosecutor's office going to put the entire  
4 file out in the media?

5 MS. MULLIN: I don't believe  
6 so as it's a pending case, Your Honor.

7 THE COURT: Well, it didn't  
8 limit them talking about something here that  
9 wasn't presented to this Court --

10 MS. MULLIN: It's --

11 THE COURT: -- in at least  
12 two media sources.

13 MS. MULLIN: The material he  
14 referenced was clearly contained within the  
15 6th Circuit opinion, which is a publicized  
16 opinion.

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

19 MS. MULLIN: Yes. Judge  
20 Adams' opinion states those references --

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

1           Now, let's deal with your bond  
2 motion. In case I have prematurely responded  
3 with regard to this matter, I have read your  
4 motion. I thought when people had new trials  
5 they were considered innocent until proven  
6 guilty. That doesn't appear to be the  
7 approach you're taking in this brief. Your  
8 issue has to do with whether Mr. Apanovitch  
9 might be a flight risk and this is continuing  
10 as a capital case, correct?

11           MS. MULLIN:                   Correct, Your  
12 Honor. My approach is based on using the law  
13 that applies to bonds as well as criminal rule  
14 46.

15           THE COURT:                   All right.

16           Mr. DeVan?

17           MR. DEVAN:                   Your Honor, the  
18 Court is very well aware of the facts of this  
19 case as is on the record at this point. The  
20 Court has already made a decision regarding  
21 bond. It set bond at \$100,000 personal bond  
22 with conditions of monitoring.

23           In regards to release on bond, Your  
24 Honor, Mr. Apanovitch has -- we have two  
25 people here in the courtroom today who are

1 prepared to be examined by the Court, if the  
2 Court wishes, who will provide Mr. Apanovitch  
3 with a place of residence and comply with all  
4 conditions of pretrial release, including  
5 electronic monitoring as the Court has already  
6 ordered.

7 In addition, we have available  
8 another place that is in Franklin County run  
9 by Dr. Richard Wing, who is with the First  
10 Community Church. He has been counseling  
11 death-row prisoners. He and his fellow  
12 congregants and parishioners have been  
13 counseling death-row inmates now for two  
14 years, and they are putting in place, it will  
15 take about 30 days, a residence for  
16 Mr. Apanovitch, a job, transportation, and  
17 supervision, including support and counseling  
18 and various types of assistance for  
19 Mr. Apanovitch during the pendency of this  
20 case. So we have two places for  
21 Mr. Apanovitch to go, one immediately and one  
22 in approximately 30 days.

23 The facts of this case have not  
24 changed from those on which the Court relied  
25 in setting bond, so I ask that the Court

1 continue with its original order, leave the  
2 order for release on personal bond, \$100,000  
3 personal bond, plus conditions, in place. It  
4 simply hasn't changed. So that's what we're  
5 asking the Court to do.

6 THE COURT: My concern,  
7 Mr. DeVan, is that I may have acted  
8 prematurely in the heat of the moment. This  
9 is still a capital case and while I did,  
10 subject to appeal, make some decisions with  
11 regard to two of the counts in the case, it  
12 still leaves two very major and valid counts.  
13 I think I actually did act prematurely and did  
14 not show a wise decision at that point. I  
15 apologize for that and I apologize to any  
16 effect that may have had on Mr. Apanovitch.

17 I think I should convert that to  
18 \$100,000 bond, not a personal bond, with the  
19 other conditions; if that can be met, that's  
20 fine. I do believe the nature of this case is  
21 such that I acted prematurely. In reflecting  
22 upon that, I think that that's a more  
23 appropriate way to proceed in the case.

24 Obviously if they're appealing this  
25 morning, you can cross-appeal with regard to

1 whether you think I've acted inappropriately,  
2 and that may be true, with regard to the bond.

3 MR. DEVAN: In regards to  
4 the bond, Your Honor, would the Court make  
5 that a 10 percent?

6 THE COURT: I don't think I  
7 can.

8 MR. DEVAN: Would that be  
9 then cash, surety, or property?

10 THE COURT: Yes, sir.

11 MR. DEVAN: All right. So  
12 surety will satisfy that bond?

13 THE COURT: Absolutely.

14 MR. DEVAN: Will there be  
15 conditions on that in addition to the posting  
16 of a surety bond?

17 THE COURT: Same conditions.  
18 Court-supervised release and electronic  
19 monitoring.

20 MR. DEVAN: When it comes to  
21 electronic monitoring, Judge, would the Court  
22 consider perhaps GPS as an alternative to --

23 THE COURT: I think with  
24 that bond, yes.

25 MR. DEVAN: Very good. Now,

1 in terms of placement --

2 THE COURT: If it's in Ohio,  
3 I don't have an objection.

4 MR. DEVAN: It's Stark  
5 County first, then Franklin County, once we  
6 set up something in Franklin County. All  
7 right. Very good.

8 Does the Court wish to examine the  
9 people with whom he will be staying?

10 THE COURT: No, I don't  
11 think that's necessary. I appreciate them  
12 being here.

13 MR. DEVAN: Thank you very  
14 much.

15 THE COURT: Anything further  
16 the Court can deal with this morning?

17 MS. MULLIN: We thank you,  
18 Your Honor, for your opportunity to reconsider  
19 the bond motion. We would just like to note  
20 our ongoing objection, as we believe that the  
21 bond is still low in comparison with the  
22 others cross-charged, but thank you for your  
23 time, Your Honor.

24 THE COURT: I expected that.  
25 And I expected to be excoriated on this case.

1           Since I brought them up, Lori, I'd  
2 like to have these two articles marked Court's  
3 Exhibits 1 and 2, Plain Dealer and WKYC,  
4 respectively.

5           Based upon your representation, Miss  
6 Mullin, that there's going to be an appeal  
7 filed, it seems silly to set a pretrial,  
8 although I don't like to have this suspending  
9 out there without a date set. I also don't  
10 want to waste your calendars unnecessarily.

11           So I will, on your representation,  
12 wait for notice of the appeal, at which point  
13 that will freeze any activity by this Court  
14 until a final determination is made.

15           Anything further?

16           MR. DEVAN:                   Not at this  
17 time. I will get back to the Court regarding  
18 the appointment of counsel.

19           THE COURT:                   Very good. I  
20 would certainly consider the appointment of  
21 counsel for the appeal as well, Mr. DeVan.

22           MR. DEVAN:                   Thank you,  
23 Judge.

24           (Thereupon, Court was adjourned.)

25           - - - -



# Court of Appeals of Ohio

MAY 05 2016

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
Nos. 102618 and 102698

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**STATE OF OHIO**

PLAINTIFF-APPELLANT

vs.

**ANTHONY APANOVITCH**

DEFENDANT-APPELLEE

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-84-194156-ZA

**BEFORE:** Jones, A.J., Celebrezze, P.J., and Laster Mays, J.

**RELEASED AND JOURNALIZED:** May 5, 2016

**EXHIBIT C**

CR84194156-ZA

94003498



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LARRY A. JONES, SR., A.J.:

{¶1} This is an appeal by plaintiff-appellant, the state of Ohio, from the trial court's February 12, 2015 decision granting defendant-appellee's, Anthony Apanovitch, fourth petition for postconviction relief, thereby acquitting Apanovitch of one of two counts of rape, dismissing the second count of rape, and granting a new trial on the remaining charges, which consist of aggravated murder and aggravated burglary with specifications.<sup>1</sup> We affirm.

### **Factual Background and Procedural History**

{¶2} The incident that gave rise to this death penalty case was the 1984 rape and murder of Mary Ann Flynn; she was found dead in her Cleveland duplex on August 24, 1984. The investigation revealed that entry into the home had likely been through a basement window, which appeared to have been forcibly opened. Further, one of the basement window sills was missing. The day before her body was discovered, August 23, Apanovitch had been working at the house of Flynn's neighbor, and approached Flynn, whom he knew, to ask her if she wanted him to paint her basement window sills; she declined the offer.

{¶3} Flynn's body was discovered in a second-floor bedroom; she was naked and battered, lying face down on a mattress, with her hands tied behind her back, with one end of what appeared to be a rolled-up bed sheet tied around her neck

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<sup>1</sup>The aggravated murder count contained a rape specification, but given the court's disposition on the two rape counts, that specification was dismissed.

and the other end tied to the headboard. Slivers of wood from a basement window sill were found in the bedroom, on Flynn's body, and in a laceration in the back of her neck.

{¶4} As mentioned, Apanovitch knew Flynn — he had done house painting for her in July 1984. During that time, he had made unwelcome advances toward her and even asked her out in the presence of his pregnant wife. Shortly after hiring Apanovitch in July 1984, Flynn terminated the use of Apanovitch's services prior to his completion of the painting. Afterward, however, she complained to friends that the "painter" still harassed her and that she was afraid of him. A copy of the contract for the painting work was found on Flynn's kitchen table the day after her body was discovered.

{¶5} Days after Flynn's body was discovered, Apanovitch became a suspect in her murder. He voluntarily made himself available for questioning by the police, waiving his *Miranda* rights. He denied any involvement in the crimes and voluntarily provided hair, saliva, and blood samples, along with several articles of clothing for testing. Apanovitch continued to deny involvement in the crimes throughout the investigation of the case.

{¶6} Apanovitch gave conflicting accounts of his whereabouts at the time it was surmised that the crimes occurred; however, according to three of the state's witnesses, he asked them to lie about his whereabouts. He also had scratches on his face and gave varying accounts to law enforcement about how he

got them. The coroner, who had observed the scratches on Apanovitch's face while he was in police custody, testified at trial that she believed they were consistent with fingernail scratches.

{¶7} Little physical evidence of the assailant was found, however — no bodily material was found under Flynn's fingernails, the only blood at the scene belonged to Flynn, and no footprints were revealed. One hair was found on Flynn's body that was identified as being inconsistent with both Flynn and Apanovitch's hair, and although the police identified a number of latent fingerprints, none of them belonged to Apanovitch. At trial, only two pieces of scientific physical evidence were presented to the jury: the hair found on Flynn and evidence relating to the blood-type of Flynn and Apanovitch. As will be discussed in more detail below, both of these items of scientific physical evidence were problematic.

{¶8} On October 2, 1984, Apanovitch was indicted by a Cuyahoga County Grand Jury on two counts of rape, one count each of aggravated murder, with felony murder specifications, and aggravated burglary, with aggravated felony specifications. The case proceeded to a jury trial on November 26, 1984. The jury convicted Apanovitch of all counts and specifications and recommended a death sentence. The trial court adopted the jury's recommendation and imposed a death sentence. The court also sentenced Apanovitch to consecutive 15-25 year prison terms on the aggravated burglary and two rape convictions, for a total of

45-75 years in prison.

{¶9} This case has been the subject of extensive and convoluted litigation in both state and federal courts in the years since the 1984 conviction and 1985 death sentence.<sup>2</sup> Those cases, and further facts, will be discussed below as necessary.

### 1984 Autopsy

{¶10} An autopsy of Flynn's body was conducted the day after her body was discovered. Sperm was found in Flynn's mouth and vagina. It was determined that the perpetrator of the crimes had blood type A. Apanovitch has blood type A, and that evidence was introduced by the state at trial. Apanovitch was also a secretor, meaning that he secretes his blood type through other bodily fluids. At trial, the analyst testified that approximately 44-55% of the population was

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<sup>2</sup>Included in the numerous cases on this matter are the following: (1) *State v. Apanovitch*, 8th Dist. Cuyahoga No. 49772, 1986 Ohio App. LEXIS 8046 (Aug. 28, 1986) (direct appeal — conviction and sentence upheld); (2) *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987) (conviction and sentence upheld); (3) *State v. Apanovitch*, 70 Ohio App.3d 758, 591 N.E.2d 1374 (8th Dist.1991) (denial of first postconviction petition affirmed); (4) *State v. Apanovitch*, 107 Ohio App.3d 82, 667 N.E.2d 1041 (8th Dist.1995) (denial of second postconviction petition affirmed); (5) *State v. Apanovitch*, 113 Ohio App.3d 591, 681 N.E.2d 961 (8th Dist.1996) (denial of third postconviction petition affirmed); (6) *Apanovich [sic] v. Taft*, S.D.Ohio No. 2:05-CV-1015, 2006 U.S. Dist. LEXIS 54607 (July 21, 2006) (dismissal of Apanovitch's civil rights action as an Ohio death-row inmate affirmed); (7) *Apanovitch v. Houk*, 466 F.3d 460 (6th Cir.2006) (appeal of denial of Apanovitch's writ of habeas corpus — judgment reversed in part; case remanded to district court for consideration of certain *Brady* issues and for a hearing on the state's request that Apanovitch's DNA be compared to swabs previously believed lost); (8) *Apanovitch v. Houk*, N.D.Ohio No. 1:91CV2221, 2009 U.S. Dist. LEXIS 103985 (Aug. 14, 2009) (proceeding on remand — habeas writ denied); and (9) *Apanovitch v. Bobby*, 648 F.3d 434 (6th Cir.2011) (denial of writ of habeas affirmed).

blood type A and that approximately 80% of the population were secretors. According to the analyst, therefore, there were approximately 340,000 men in Cuyahoga County who could have emitted the fluids found in Flynn.

### **Amended Trace Analyst Report**

{¶ 11} Flynn also had blood type A. The original trace evidence report that was available at the time of trial did not indicate if Flynn was a secretor, however. On appeal to the Ohio Supreme Court, after Apanovitch's direct appeal to this court, which affirmed the convictions and sentence,<sup>3</sup> the Ohio Supreme Court upheld the convictions and sentence in a 4-3 decision. *Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987). The dissent objected to the imposition of the death penalty, finding that the "evidence of guilt in this case, while sufficient to meet the various standards which an appellate court must use to measure legal error, is far from overwhelming." *Id.* at 29 (Brown, J., concurring and dissenting).

{¶ 12} The dissent had two evidentiary areas of concern. The first, raised sua sponte by the dissent, related to the blood evidence:

If the victim was a secretor, the recovery of a type A antigen from the swab contained from the victim (who herself was a type A) offers no information concerning the blood type of the assailant, because *the recovered antigens could have as easily originated from the victim as from the assailant.*

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<sup>3</sup>*State v. Apanovitch*, 8th Dist. Cuyahoga No. 49772, 1986 Ohio App. LEXIS 8046 (Aug. 28, 1986).

(Emphasis sic.) *Id.* at 30.

{¶13} Flynn, in fact, was a secretor. The police knew this within the first few days of their investigation, but it was not disclosed to Apanovitch until 1992. After the Ohio Supreme Court's decision, the trace evidence report was amended to reflect Flynn's secretor status.

{¶14} The dissent's second concern related to the human hair found on Flynn, which, as mentioned, was neither Flynn nor Apanovitch's hair. The state's position at trial was that it was not uncommon for law enforcement or crime scene personnel to lose a hair while doing their work around a body. The dissent stated:

[w]hile this may have been the case, the better approach would have been to have the hair analyzed against all crime scene personnel who could have deposited it. Such elimination procedure is not overly burdensome given the penalty sought to be extracted by the state.

*Id.* at 31.

{¶15} At trial, the state's representative testified that the hair was found "on the back portion of [Flynn's] hand, which would have been the upper surface." *Apanovitch*, 648 F.3d 439 (6th Cir.2011). The representative also described the hair as being "in the area of [Flynn's] hand." *Id.* at 440. The state argued that the hair could have fallen from the law enforcement officials who were around Flynn's body after it was discovered and transported to the coroner's office. But the state did not disclose to the defense that the report prepared by the trace evidence department stated that the hair was found "under [Flynn's] bound

hands.” *Id.* at 439.

{¶16} The course of the litigation in this case also demonstrated that the state failed to disclose to the defense a document in which a detective wrote that Apanovitch said something different than what the detective testified at trial was said. Specifically, the detective testified at trial that in a pre-arrest conversation with Apanovitch, Apanovitch asked him to let him know “when” he was going to be arrested so that he could break the news to his mother, who had a heart condition. *Id.* at 438. The detective testified that Apanovitch’s request “stunned” him. *Id.* The detective’s report, however, stated that Apanovitch asked the detective to give him warning “if” he was going to be arrested. *Id.* The report further states that, even with his request, Apanovitch maintained his innocence, which the jury was also not informed of. Apanovitch did not secure the Cleveland Police Department’s investigative file until years after his conviction, during his state postconviction proceedings.

### **Autopsy Swabs**

{¶17} Swabs of bodily fluids from Flynn’s body were collected during the autopsy. At the time of trial, however, they were unavailable — the state believed they had been inadvertently lost or destroyed. In 1991, the state found the evidence — two oral slides and one vaginal slide — in a desk of an employee at the coroner’s office.

## Testing after the Previously Believed Lost Evidence was Discovered

{¶18} After the slides were discovered, the prosecutor's office sent the three slides to the Forensic Science Laboratory ("FSA") in California for testing. In May 1992, FSA issued a report finding that one slide of the oral swab could be tested, but that the second oral swab and the vaginal slide could not be tested because of the size and deterioration of the samples. More testing was also conducted by the coroner's office in 2000 and 2001, but Apanovitch was not made aware of the testing or results until 2008 during his federal habeas proceeding.

{¶19} During his federal habeas proceeding, the district court deferred any consideration of the DNA evidence until chain of custody issues were resolved. After the chain of custody issues were resolved in favor of the state, the district court declined to hold a hearing on the DNA issues and instead issued a final decision. On appeal to the Sixth Circuit, the court noted that the DNA evidence had not been "subjected to appropriate evidentiary challenges," stating the following:

We suspect that the DNA evidence, should it be introduced and subjected to appropriate evidentiary challenges in court, might help resolve lingering questions of whether Apanovitch suffered actual prejudice when the state withheld the serological evidence, and whether Apanovitch's innocence claim can be verified. We note that Apanovitch could well benefit from any ambiguity or error in the results that might lessen the exact accuracy of any hypothetical match with his own DNA. But these issues are better suited to the district court.

*Apanovitch*, 466 F.3d at 489-490 (6th Cir.2006).

{¶20} The district court never held a hearing on the DNA evidence, however, DNA testing that was not available at the time of trial was conducted on the evidence and Dr. Edward Blake, of FSA, issued a 2007 report.

{¶21} In 2012, after all of his federal appeals were exhausted,<sup>4</sup> Apanovitch filed his fourth petition for postconviction relief in the common pleas court based on the newly discovered evidence. The petition was brought under R.C. 2953.21(A)(1), and the parties also agreed that Crim.R. 33, governing new trials, applied. On October 14 and 15, 2014, the trial court held a hearing on the petition, and thereafter issued the February 12, 2015 judgment, which is the subject of this appeal.

#### **Dr. Edward Blake of FSA**

{¶22} Prior to the hearing on the petition at issue, the parties had much discussion about Dr. Blake at numerous pretrial conferences with the court. The discussion centered around Dr. Blake's lack of willingness to participate in this case. Apanovitch had attempted to depose him, but he refused to appear unless he was paid substantial hourly fees and costs. Discussion regarding various options about how to proceed vis-a-vis Dr. Blake was had during the course of the pretrial conferences.

{¶23} At one of the conferences regarding Dr. Blake, held on July 31, 2014,

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<sup>4</sup>In 2012, the United States Supreme Court denied Apanovitch's petition for writ of certiorari. *Apanovitch v. Bobby*, 132 S.Ct. 1742, 182 L.Ed.2d 535 (2012).

the state represented that, given the problems with securing Dr. Blake, it would not be relying on him as a witness at the hearing on Apanovitch's fourth postconviction petition. The trial court then stated its "position that Blake's out and I'm not going to allow him to testify." The defense confirmed for "clarification, so we're all on the same page, it's not just that he won't be allowed to testify, it's that his prior reports and his prior work will not be allowed in and will not be used and relied on for any purpose." The trial court stated that was the understanding, and the state did not object. In an order dated August 1, 2014, the court confirmed that "Dr. Blake will not be presented as a witness and none of his reports or findings will be admitted."

{¶24} Prior to the hearing at issue here, the parties agreed on a joint set of hearing exhibits, which included the trial transcript and many of the original trial exhibits. Two experts testified at the October 2014 hearings — Dr. Rick Staub for the defense and Dr. Elizabeth Benzinger for the state. Both experts testified in depth about DNA testing, the reliability of samples, and interpreting the results.

#### **Dr. Staub**

{¶25} Dr. Staub, a forensic scientist, testified for the defense.<sup>5</sup> He reviewed the DNA testing on the samples taken from Flynn during her autopsy. He

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<sup>5</sup>Dr. Staub owned a consulting business and manages the crime scene investigation unit and evidence room for the Plano, Texas police department. Most of his previous expert testimony had been for the prosecution.

testified about the one item (item 1.2) that provided informative data for both the female portion of the data and the male portion of the data; the slide was made from material taken from Flynn's vagina that contained sperm. According to Dr. Staub, the female portion was consistent with Flynn's profile. The male portion of the DNA had a mixture of at least two contributors, and Apanovitch was excluded as a contributor to that sample, meaning he could not have contributed to that DNA.

{¶26} Dr. Staub further testified about how he would account for the possibility of the slide being contaminated and found in regard to item 1.2 that there was no possibility of contamination "whatsoever." Thus, Dr. Staub's conclusion as to item 1.2 was that Apanovitch "could not have contributed the DNA that's found in that sample."

#### **Dr. Benzinger**

{¶27} Dr. Benzinger, from the Ohio Bureau of Criminal Investigations, testified for the state. She testified that she believed that there are at least three people's DNA in the item 1.2 sample. Dr. Benzinger testified that she believed the sample was contaminated, although she admitted that the two people who had previously worked on it during the time frame she believed the contamination occurred were females. Dr. Benzinger was not asked if it was her opinion whether the results of the testing on item 1.2 excluded Apanovitch.

{¶28} Based on this testimony, the trial court found that Dr. Staub's

testimony was uncontroverted and, therefore, that Apanovitch presented clear and convincing evidence of his actual innocence of vaginal rape, and acquitted him of same.

{¶29} The two counts of rape were identically worded. The court further found that, because the two rape counts were identical and there was no other differentiation between them (i.e., vaginal and oral rape), the lack of specificity required dismissal of the other rape count. The court then found that, with the two counts of rape removed, the “nature and tenor of the case changes greatly.” Thus, under Crim.R. 33, the court found that subsection 4 — that the verdict is not sustained by sufficient evidence or is contrary to law — applied and ordered a new trial as to the aggravated murder with specifications and aggravated burglary with specifications. The state appeals, raising the following five assignments of error for our review:

I. The trial court abused its discretion by finding that Apanovitch proved by clear and convincing evidence his actual innocence of the vaginal rape.

II. The trial court abused its discretion by refusing to consider the FSA reports confirming Apanovitch’s sperm was present in Flynn’s mouth.

III. The trial court erred by ambushing the State with a new and unbriefed issue in its opinion that it never gave the parties an opportunity to address.

IV. The trial court erred by finding a *Valentine* error where there were only two counts of rape in the indictment and the evidence at trial delineated a separate factual basis for each count.

V. The trial court abused its discretion by setting a bond of just \$100,000 in a death penalty case.

## Law and Analysis

### Standard of Review

{¶30} A trial court's decision regarding a postconviction petition filed pursuant to R.C. 2953.21 will be upheld absent an abuse of discretion when the trial court's finding is supported by competent and credible evidence. *State v. Condor*, 112 Ohio St.3d 377, 390, 2006-Ohio-6679, 860 N.E.2d 77. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). Thus, we should not overrule the trial court's finding on Apanovitch's petition if the court's decision is supported by competent and credible evidence.

### Trial Court's Finding of Actual Innocence as to Vaginal Rape without Considering Dr. Blake's Reports

{¶31} The state's first assignment of error challenges the trial court's finding of actual innocence as to the vaginal rape. The state's second assignment of error challenges the trial court's decision in that it did not consider Dr. Blake's reports.

{¶32} R.C. 2953.23 governs successive petitions for postconviction relief and, relative to this case, provides that a court may consider such a petition if

[t]he petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections

2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

R.C. 2953.23(A)(2).

{¶33} Under R.C. 2953.21(A)(1)(b), actual innocence means that

had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

{¶34} "Clear and convincing evidence requires a degree of proof that produces a firm belief or conviction regarding the allegations sought to be proven." *State v. Gunner*, 9th Dist. Medina No. 05CA0111-M, 2006-Ohio-5808, ¶ 8. "It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954).

{¶35} In its first assignment of error, the state maintains that, in addition

to the “voluminous circumstantial evidence” against Apanovitch, Dr. Blake’s 2007 testing demonstrated that Apanovitch was not actually innocent of the vaginal rape. The state contends that the “trial court, however, disregarded [Dr. Blake’s findings] in favor of other testing of a weaker DNA sample that yielded multiple male profiles and that had no definitive nexus to the murder.”

{¶36} Thus, the state is now contending in this appeal that the trial court abused its discretion by failing to consider Dr. Blake’s findings. As previously set forth, Dr. Blake was the subject of much discussion in the proceedings on this fourth postconviction petition. In sum, the defense sought to depose him, he was uncooperative because he wanted to be paid substantial hourly fees and costs, and ultimately the state stipulated that because of the problems in securing his appearance, the state would not be relying on him as a witness in these proceedings. To that end, the trial court issued an order stating “Dr. Blake will not be presented as a witness and none of his prior reports of findings will be admitted.”

{¶37} The state contends that, its stipulation aside, Dr. Blake’s findings were part of the record in this proceeding because it was “litigated to finality by the federal district court,” whose “decisions were binding on the state courts.” The state also maintains that Dr. Blake’s findings were part of the record because Apanovitch attached them to his postconviction petition at issue now.

{¶38} The trial court, citing this court’s decision in *State v. Larkin*, 8th

Dist. Cuyahoga No. 85877, 2006-Ohio-90, declined to follow the law of the case as it related to the DNA evidence. Rather, the trial court considered the DNA evidence “free from any restraint which could have been imposed by that doctrine.” We find that the trial court acted within its discretion in that regard.

{¶39} In *Larkin*, this court stated that following in regard to the law of the case doctrine:

The United States Supreme Court has stated that “law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.” *Arizona v. California* (1983), 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318, citing 1B J. Moore & T. Currier (1982), Moore’s Federal Practice, [pg].404. The Ohio Supreme Court has interpreted the law of the case doctrine to provide that the “decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.” *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 Ohio B. 1, 462 N.E.2d 410.

*Id.* at ¶ 29.

{¶40} This court explained that there are exceptions to the law of the case doctrine, however, stating:

The law of the case doctrine is discretionary in application, subject to three exceptions: (1) the evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice.

*Id.* at ¶ 30, citing *United States v. Bezerra*, 155 F.3d 740, 752-753 (5th Cir. 1998).

{¶41} In this case, the trial court found that the first and third exceptions applied. Specifically, the court found that “[a]s a result of the evidence presented

at [the] hearing there has been a material change in the nature of the evidence from what was presented at trial,” and the “new evidence shows that, at least, some portion of the prior decision was clearly erroneous and to apply the law of the case would work a manifest injustice.”

{¶42} As mentioned, the law of the case doctrine is discretionary; it is considered a “rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.” *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404, 659 N.E.2d 781 (1996). On the record before us, we find that the trial court acted within its discretion in not applying the law of the case doctrine as it related to the DNA evidence.

{¶43} In regard to the state’s contention that Dr. Blake’s findings should have been considered by the trial court because Apanovitch attached them to his fourth petition, we reiterate the extensive discussion that was had by the parties regarding Dr. Blake and the state’s ultimate stipulation that it was not going to rely on any of Dr. Blake’s findings. After such a stipulation, it would be unjust to now allow the state to reverse course.

{¶44} Thus, the trial court was left with the opinion of Dr. Staub, who unequivocally opined that the results of the DNA testing of the vaginal slide materials excluded Apanovitch. Dr. Benzinger did not controvert that finding.

{¶45} Moreover, contrary to the state’s position, there was not “voluminous circumstantial evidence” against Apanovitch. As the dissent in Apanovitch’s

appeal to the Ohio Supreme Court noted, the “evidence of guilt in this case \* \* \* is far from overwhelming.” *Apanovitch*, 33 Ohio St.3d at 29, 514 N.E.2d 394 (Brown, J., concurring and dissenting).

{¶46} On this record, therefore, the trial court did not abuse its discretion in finding that Apanovitch presented clear and convincing evidence of actual innocence relative to vaginal rape.

{¶47} In light of the above, the state’s first and second assignments of error are overruled.

### ***Valentine Issue***

{¶48} In its third assignment of error, the state challenges the trial court’s dismissal of the second count of rape under *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005). In its fourth assignment of error, the state contends that the trial court erred in finding a *Valentine* violation because the trial evidence delineated a separate factual basis for each of the two counts of rape.

{¶49} Counts 3 and 4 of the indictment against Apanovitch identically charged rape. After the trial court found that Apanovitch had presented clear and convincing evidence of actual innocence relative to the vaginal rape, the trial court was left with the query of which count should be dismissed. No bill of particulars was filed in this case, so there was no clarification in that regard. The trial court then considered the jury instructions for guidance. The instructions referred to “vaginal intercourse and/or fellatio,” but did not

distinguish which allegation of rape went with which count. Thus, the jury instructions did not provide any guidance. Because the court could not differentiate either of the rape counts, it acquitted Apanovitch of one count as relief under his postconviction petition, and dismissed the other for its “lack of specificity or differentiation from the other count in violation of [Apanovitch’s] due process rights.” The court cited *Valentine* in support of its decision.

{¶50} The state contends that the trial court erred by raising the issue sua sponte, without giving the parties the opportunity to brief it, and cites *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, in support of its contention. In *Tate*, the defendant appealed his gross sexual imposition and kidnapping convictions on sufficiency grounds. Specifically, he contended that the state had failed to produce evidence that he forced, threatened, or deceived the victim to go with him or that he used force or threat of force to obtain sexual contact. He never contended that he was not the perpetrator and, in fact, testified at trial that he had approached the victim, walked with her, and asked for oral sex. According to the defendant, he had not initially approached the victim with sexual motives and ended the encounter when he learned that she was underage.

{¶51} This court, sua sponte, raised the issue of identity, finding that the “record before the court is devoid of any testimony from the victim or either of her two friends identifying the appellant as the perpetrator,” and that there was “not

sufficient evidence, circumstantial or otherwise, that the appellant was ‘the man’ repeatedly referenced in the testimony of the victim and her two friends.” *State v. Tate*, 8th Dist. Cuyahoga No. 97804, 2013-Ohio-570, ¶ 10, 13.

{¶52} On appeal to the Ohio Supreme Court, the court held that there was “no conflicting evidence on the issue of identity — Tate agreed that he was the man with [the victim].” *Tate*, 140 Ohio St.3d at 446, 2014-Ohio-3667, 19 N.E.3d 888. The court reversed, “not only because the evidence of Tate’s identity was overwhelming, but also because neither party argued otherwise.” *Id.* The court stated that “appellate courts should not decide cases on the basis of a new, unbriefed issue without ‘giv[ing] the parties notice of its intention and an opportunity to brief the issue.” *Id.*, citing *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

{¶53} In light of the above, *Tate* presents a scenario distinguishable from the one presented here. We do recognize that, in some instances, a court’s raising of an issue sua sponte without allowing the parties to brief the issue can be a violation of the parties’ due process rights. But we also recognize that

‘trial courts are on the front lines of administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the ‘inherent power to regulate the practice before it and protect the integrity of its proceedings.’

*State v. Busch*, 76 Ohio St.3d 613, 615, 669 N.E.2d 1125 (1996), quoting *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 33-34, 501 N.E.2d 617 (1986).

Thus, in *Busch*, the Ohio Supreme Court upheld the trial court's sua sponte dismissal of an indictment in the interest of justice. Further, the Ohio Supreme Court has sua sponte addressed the issue of whether a defendant's double jeopardy rights would be violated by requiring a second trial after a dismissal of a defective indictment. *State v. Broughton*, 62 Ohio St.3d 253, 263, 581 N.E.2d 541 (1991).

{¶54} We are also not persuaded by the state's contention that Apanovitch had to raise this issue during the trial proceedings. In *State v. Wilson*, 8th Dist. Cuyahoga No. 93772, 2010-Ohio-6015, this court recognized that the "only way a double jeopardy issue will arise is if appellant's conviction on count three is reversed and the state wishes to retry him." *Id.* at ¶ 17.

{¶55} In light of the above, we find that the trial court properly considered the double jeopardy issue and we now consider the merits of the court's decision.

{¶56} In *Valentine*, 395 F.3d 626 (6th Cir.2005), the Sixth Circuit Court of Appeals affirmed the district court's decision granting habeas corpus relief to the defendant on all but one of his rape convictions, holding that the multiple, undifferentiated charges of rape violated the defendant's constitutional rights. *Id.* at 634. The state contends, citing this court, that

*Valentine* has no binding effect on Ohio courts. It has been criticized for applying law that does not apply to Ohio grand juries, misapplying and misrepresenting case authority, and being "distinguished in every subsequent Sixth Circuit decision that cites it on this issue."

*State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, ¶ 11, quoting *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3 and 12 MO 5, 2013-Ohio-5774.

{¶57} We recognize that *Valentine* was not binding on the trial court, but find that its discussion is helpful to the issue at hand. Specifically, in *Valentine*, the Sixth Circuit discussed two sections of the Fifth Amendment. First, the court discussed the due process portion of the Fifth Amendment which, under *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), requires that a criminal defendant be given adequate notice of the charges in order to enable him or her to mount a defense.

{¶58} Second, the court discussed the double jeopardy portion of the Fifth Amendment, which requires enough specificity of facts in an indictment to prevent a re-indictment or retrial on charges that have already been decided by a trier of fact. The Sixth Circuit held that an indictment was constitutionally sufficient only if it “(1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine* at 631. “The vast majority of cases from our district that have applied *Valentine* have been resolved under a double jeopardy analysis.” *State v. Freeman*, 8th Dist. Cuyahoga No. 92809, 2010-Ohio-3714, ¶ 35.

{¶59} For example, in *State v. Ogle*, 8th Dist. Cuyahoga No. 87695, 2007-

Ohio-5066, the defendant was charged, in part, with three identically worded counts of rape, which the state contended consisted of two instances of digital rape and one instance of oral rape. After deliberating, the jury informed the trial court that it was deadlocked on one of the three counts of rape. The court accepted the jury's verdict, which included not guilty on two of the rape counts; the court declared a mistrial on the third count of rape. The defendant filed a motion to dismiss the third rape count, and the trial court denied his motion.

{¶60} On appeal, this court reversed, finding that subjecting the defendant to a retrial on the third rape count would violate his double jeopardy rights. This court reasoned that it is

well established that the Double Jeopardy Clause protects against successive prosecutions for the same offense. \* \* \* Once a tribunal has decided an issue of ultimate fact in the defendant's favor, the double jeopardy doctrine also precludes a second jury from ever considering that same or identical issue in a later trial.

(Citations omitted.) *Id.* at ¶ 17, 19.

{¶61} Likewise, here, at issue is whether the indictment against Apanovitch contains enough specificity as to the two rape counts that a retrial on the remaining rape count will not violate his double jeopardy protections. It does not. We have carefully reviewed the record, as did the trial court, and find that there is nothing differentiating which count of rape was for which conduct — the indictment itself did not differentiate, there was no bill of particulars, the jury instructions did not differentiate, and neither the state's opening or closing

statements made the distinction.

{¶62} In light of the above, and on this record, we overrule the state's third and fourth assignments of error.

### **Bond**

{¶63} For its final assignment of error, the state contends that the trial court abused its discretion by setting a \$100,000 bond in this case.<sup>6</sup> According to the state, the court failed to consider the bond schedule of the Cuyahoga County Court of Common Pleas and the Ohio Constitution.

{¶64} After reading its decision on this postconviction petition, the trial court addressed the issue of bond and set a \$100,000 personal bond with house arrest and electronic monitoring. The state filed a motion for reconsideration, which the trial court granted. In granting the state's motion, the trial court stated that it had "acted prematurely and did not show a wise decision," and amended the bail to \$100,000 cash, surety or property, with house arrest, electronic monitoring, and court-supervised release. The state maintains that the bond is "inadequate to protect the safety of the public" from Apanovitch, and that the trial court "disregarded the facts of this case and chose to presume that the indictment was false."

{¶65} We disagree with the state's contention that the trial court

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<sup>6</sup>A trial court's bond determination is within its discretion. *In re De Fronzo*, 49 Ohio St.2d 271, 274, 361 N.E.2d 448 (1977).

disregarded the facts of the case and acted as if the indictment was false. The trial court set Apanovitch's bond after it had conducted a two-day evidentiary hearing, had reviewed volumes of evidence, not only from the two-day hearing, but also from past proceedings, and had reviewed the numerous prior cases relating to this matter. The trial court acknowledged that it had initially "acted prematurely" and did not make a "wise decision" in setting the bond. Therefore, the court reconsidered its initial bond determination, specifically stating this is "still a capital case and while I did \* \* \* make some decisions with regard to two counts in this case, it still leaves two very major and valid counts."

{¶66} We also note, as cited by Apanovitch, a similar case in this district in which a "low bond" was set after postconviction proceedings. Namely, in *State v. Keenan*, Cuyahoga C.P. No. CR-88-232189, the defendants were convicted of murder, sentenced to death, and granted postconviction relief after years of litigation. The trial court ordered their release on a \$5,000 personal bond for one defendant and a \$50,000 surety bond with house arrest and electronic monitoring for the other defendant.

{¶67} On the record before us, we do not find that the trial court abused its discretion in setting Apanovitch's bond. The fifth assignment of error is therefore overruled.

### **Conclusion**

{¶68} The trial court's February 12, 2015 judgment is affirmed. The issue

for determination in Apanovitch's fourth postconviction petition was whether newly discovered DNA evidence demonstrated his actual innocence. The state stipulated that Dr. Blake and his reports would not be part of the proceedings. The defense presented the expert testimony of Dr. Staub, who testified that it was his opinion that the results of the DNA testing of the vaginal slide materials excluded Apanovitch. The state did not elicit testimony from its expert, Dr. Benzinger, that contradicted that Dr. Staub's finding on that point. The trial court therefore did not abuse its discretion in finding that the evidence presented by Apanovitch met the standard of clear and convincing evidence of actual innocence as it related to the vaginal rape.

{¶69} Further, because the two counts of rape were identically worded in the indictment, and there was no differentiation of them elsewhere in the record, it was impossible for the court to discern which count of rape it should acquit on. To retry Apanovitch on the remaining count would violate his double jeopardy rights. Thus, the trial court properly acquitted on one count and dismissed on the other count.

{¶70} Finally, there was no abuse of discretion in the trial court's bond determination. The court properly considered the facts of the case and the nature of the remaining charges.

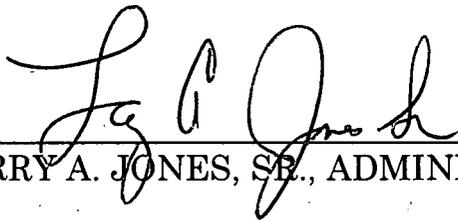
{¶71} Judgment affirmed; case remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

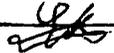


LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

FRANK D. CELEBREZZE, JR., P.J., and  
ANITA LASTER MAYS, J., CONCUR

FILED AND JOURNALIZED  
PER APP.R. 22(C)

MAY 05 2016

CUYAHOGA COUNTY CLERK  
OF THE COURT OF APPEALS  
By  Deputy

1 THURSDAY AFTERNOON SESSION

2 JULY 31, 2014

3 THE COURT: This is case  
4 number 194156, State of Ohio versus Anthony  
5 Apanovitch. This is a telephone conference to  
6 discuss some issues that may be floating out  
7 there in the case.

8 I would ask, it would be really  
9 helpful, is if people speak if they'll  
10 identify themselves, and allow the court  
11 reporter to clearly take down what's discussed  
12 here today. Obviously it's a little difficult  
13 with the conference call.

14 When -- met with Mark and Katie last  
15 week, I guess it was, and we talked about what  
16 I thought were three issues that were  
17 potentially to be discussed. They are the  
18 issues about Dr. Blake and his apparent  
19 recalcitrance and apparently appearing for  
20 deposition. And then a question arises  
21 whether it's even necessary, because I was  
22 informed that the Prosecutor's Office has no  
23 intent to call him as a witness in this  
24 proceeding.

25 The second issue is a slide.

1 Apparently there is a slide that has never  
2 been tested, and there was a question of  
3 whether or not there was a desire to have that  
4 one tested.

5           And the third had to do with how the  
6 BCI, the Bureau of Criminal Investigation has  
7 gone about categorizing the huge number of  
8 rape kits, that have been now -- I think  
9 they've gone through all of them, according to  
10 our local paper, or at least all of them have  
11 been sent for testing.

12           So those are the three issues I was  
13 aware of.

14           Is that fair, Mark?

15           MR. DEVAN:                   That is.

16           THE COURT:                   All right. So  
17 first of all, let's go with Dr. Blake. Is it  
18 still the prosecutor, your intention that he's  
19 not going to be a witness in your proceeding?

20           MS. MULLIN:                 That is our  
21 intention, Your Honor, and I'm relying  
22 primarily for that basis on paragraph 2, page  
23 25 of Anthony Apanovitch's Petition For Post  
24 Conviction Relief, where I believe he states  
25 that his claim is because of the newly

1 discovered DNA evidence. That is the basis  
2 for his claim that he's not -- not actually  
3 guilty or is actually innocent.

4           And that claim, it's my  
5 understanding, references retesting that was  
6 done by the Cuyahoga County Medical Examiner's  
7 Office in 2000 or 2001. If that's the case,  
8 and I'm understanding the issue correctly, I  
9 don't believe that Dr. Blake is a necessary  
10 witness or that I would be using him as a  
11 witness on our end, because I believe the  
12 litigation is going to focus around the  
13 retesting from the Medical Examiner's Office.

14           THE COURT:                   All right. So I  
15 mean I have guess if I were sitting in the  
16 other folks's chairs, my concern would be is  
17 that a definitive we're not calling Blake?  
18 Because if there -- I mean, if there is some  
19 chance that Blake will be called, they're  
20 going to want to depose him.

21           MS. MULLIN:                 It's definitive  
22 from our end that I don't intend to call  
23 Dr. Blake, as long as I'm understanding the  
24 scope of the issue correctly. If that's what  
25 the issue is going to be limited to, which I

1 believe is the appropriate scope of the  
2 hearing, because we've discussed res judicata  
3 for other aspects, then I don't believe  
4 Dr. Blake is necessary.

5 THE COURT: Mark?

6 MR. COHEN: This is Harry  
7 Cohen in New York, I appreciate that  
8 clarification, from you as well as from Katie.

9 I guess my follow-up question, and  
10 I'm not sure I know the answer to this, is if  
11 the State is relying only on the Medical  
12 Exam -- Examiner's Office's reports, did those  
13 reports in any way rely on the work done by  
14 Dr. Blake? I think the answer is no, but I  
15 just don't know the answer to that. But that  
16 would be my follow-up question.

17 MS. MULLIN: As far as I  
18 know, the answer to that question is no. I'm  
19 sure that the reports would reference that the  
20 slides were returned from FSA, but other than  
21 that the testing that occurred in 2000 and  
22 2001 was entirely independent of the testing  
23 that occurred by FSA.

24 THE COURT: All right. It's  
25 my position that at this point Blake's out and

1 I'm not going to allow him to testify. And if  
2 somehow that changes between now and October,  
3 I'm certainly not going to limit somebody, but  
4 as far as I can tell, Blake's out.

5 So whether that changes your concern  
6 about chasing him around California or not, I  
7 don't know.

8 MR. COHEN: Your Honor, this  
9 is Harry Cohen again, I appreciate that.

10 Just so you know, we did proceed with  
11 the petition in California with Dr. Blake, did  
12 not respond to our various attempts to  
13 communicate with him. Our understanding is  
14 that the papers were served on him, but based  
15 on the current state of play, we would have no  
16 intention of going forward with the  
17 enforcement of that petition. He's out and  
18 we're comfortable with that.

19 THE COURT: Okay. Well, my  
20 position, it will be on the transcript and  
21 I'll probably have some sort of an order  
22 following this conference, that Blake will not  
23 be permitted to testify barring some  
24 unforeseen issue. And if that happens, that  
25 means, once again, this matter would, over my

1 dead body, get kicked forward some more.

2 All right.

3 MR. COHEN: Your Honor, this  
4 is Harry again, again, I just want to get  
5 clarification, so we're all on the same page,  
6 it's not just that he won't be allowed to  
7 testify, it's that his prior reports and his  
8 prior work will not be allowed in and will not  
9 be used and relied on for any purpose.

10 THE COURT: Can't get it in  
11 without him.

12 MR. COHEN: Okay.

13 THE COURT: I don't know any  
14 evidence rule that would allow that, unless  
15 you stipulated to it.

16 MR. COHEN: Okay, thank you.

17 THE COURT: All right. How  
18 about the slide they have that hasn't been  
19 tested? I think -- did you say it was  
20 vaginal?

21 MS. MULLIN: Yes.

22 THE COURT: Vaginal fluid.  
23 What's your desire with regard to that?

24 MR. COHEN: This is Harry  
25 Cohen again, I think we're not at a point yet

1 that we have a definitive decision. We  
2 have -- we're planning on scheduling a meeting  
3 with our client to talk to him about that.  
4 There is some historical documents regarding  
5 the present state of the slide and what's  
6 contained on it, which folks on our team are  
7 looking at. And we hope to make a decision  
8 shortly, but we're not in a position to do  
9 that right now.

10 THE COURT: Do we know how  
11 long a time period would be needed -- should  
12 you decide to have it tested, what kind of  
13 time is needed?

14 MR. COHEN: This is Harry  
15 again, my understanding -- and Liz actually  
16 might know this a little better than I do, but  
17 I think the process would be that we would  
18 have to obviously agree on what lab would do  
19 the testing, and depending on their schedule  
20 it would take something in the matter of two  
21 weeks or so. So I don't think that it's the  
22 kind of time frame that would put the October  
23 dates at risk, which we don't want to do.

24 THE COURT: So if I say  
25 you're going to make a decision by

1 September 1st?

2 MR. COHEN: That would be  
3 fine, Your Honor.

4 THE COURT: All right. So  
5 that's your drop dead date, as far as the  
6 testing.

7 All right.

8 MR. COHEN: Actually,  
9 September 1st is Labor Day. Can we just make  
10 it September 2nd?

11 THE COURT: Sure.

12 MR. COHEN: Okay.

13 THE COURT: Okay. Third  
14 issue: Katie, why don't you explain your  
15 understanding of what BCI has done and where  
16 there may be information available on this.

17 MS. MULLIN: Sure, Your  
18 Honor. The defense had requested that we  
19 inquire into how BCI is storing this  
20 information from the sexual assault kits. And  
21 the sexual assaults kits that they are  
22 specifically referencing are the older sexual  
23 assault kits that are now getting tested.

24 I looked into that information, and  
25 it appears that BCI does not store location

1 information of the incidents, but they do  
2 store the date of the offense. So that should  
3 be information that could be obtained from  
4 BCI, as far as I'm aware. However, in  
5 speaking with Brian McDonough, who is our -- I  
6 guess his actual title is project manager of  
7 the CODIS Unit, I was informed that what the  
8 defense could do, if they want, is to make a  
9 public records request from the Crime Analysis  
10 Unit of the Cleveland Police Department, in  
11 order to obtain location data and  
12 corresponding RMS reports.

13 MR. COHEN: This is Harry  
14 Cohen. Again, I appreciate that helpful  
15 detail, Katie. I think what we'll do on our  
16 end is after this call, we'll get together and  
17 have a discussion and decide. If we want to  
18 make those public records requests we will do  
19 so expeditiously.

20 THE COURT: All right. Are  
21 there other issues pending that we haven't  
22 talked about?

23 MS. MULLIN: There is one --

24 MR. COHEN: Yes, Your Honor,  
25 this is Harry again.

1 THE COURT: Okay.

2 MR. COHEN: This is sort of  
3 a general topic that I actually had raised in  
4 prior calls and that has to do with a more  
5 sort of general process and schedule. And we  
6 had actually had preliminary e-mail exchange  
7 with Katie about talking about an interim  
8 schedule leading up to the hearing in October,  
9 with respect to exchange of expert reports,  
10 specifically, and whether there would be the  
11 opportunity to depose those folks.

12 The fact that Blake is now out of the  
13 picture might change that a little bit, but  
14 what we wanted to broach with you and Katie  
15 more generally would be a process whereby the  
16 parties would at some point prior to --  
17 obviously prior to the -- well prior to the  
18 hearing, have a date by which they would  
19 submit disclosures to one another regarding  
20 what witnesses and/or evidence they intend to  
21 rely on at the hearing, so that there is no  
22 element of surprise.

23 So you know, whether it's an exchange  
24 of exhibits and/or a witness list, and it can  
25 be done within a time period whereby the

1 witnesses identified on the list, there would  
2 be the opportunity for the other side to take  
3 depositions if they thought that was  
4 appropriate.

5 I think we had generally raised the  
6 topic of disclosures in prior calls to make  
7 sure that there was no element of surprise on  
8 either side, but we think it might make sense  
9 to treat this as you would pretrial  
10 disclosures, if you will, and have a date by  
11 which the parties will exchange, again,  
12 witness lists, fact or expert; exhibit lists,  
13 and then do that at a stage over the next  
14 several weeks or so, so that there would be  
15 the opportunity to take depositions.

16 THE COURT: What are you  
17 recommending?

18 MR. COHEN: In terms of  
19 specific dates?

20 THE COURT: Yeah.

21 MR. COHEN: I think that --  
22 what is it now, it's the 31st, if we could  
23 have share -- or trade disclosures on either  
24 August 22nd or August 29th, I guess preferably  
25 the 22nd so that we would have 1, 2, 3 -- we

1 would have a month, 5, 6 weeks to take  
2 depositions again if we thought it was  
3 appropriate.

4 THE COURT: What are your  
5 thoughts, Katie?

6 MS. MULLIN: I think that's a  
7 great idea, Judge. My only concern is that  
8 because this is -- it's a little bit different  
9 because it's post conviction, so it's the  
10 defendant's burden --

11 THE COURT: Right.

12 MS. MULLIN: -- for the  
13 hearing.

14 I am hesitant to list who I'm going  
15 to use definitively as a witness, until I've  
16 seen who they're going to call as a witness.  
17 Because I need to have a better understanding  
18 of the scope of what they intend to present.

19 THE COURT: All right. Here  
20 is what I recommend, why don't we have it,  
21 Harry -- well, let's talk about it, but my  
22 thought was if you were to submit your list by  
23 August 20th, Katie would have to respond by  
24 the 27th. This is sort of like in a civil  
25 case, where you list everybody including the

1 kitchen sink, doesn't necessarily mean you're  
2 going to call them, but you don't want to get  
3 caught with your pants down, where you say  
4 wait a minute, you didn't list Mr. Smith, and  
5 all the sudden you want to bring Mr. Smith in.

6           What do you think about that kind of  
7 timing, that kind of plan?

8           MR. COHEN:                    Again, this is  
9 Harry Cohen, I think that that's a fine idea.  
10 One alternative might be -- and I recognize  
11 Katie's point that we bear the burden, and she  
12 wants to see what we're going to be relying on  
13 in order to put in her rebuttal case or her  
14 response, but to the extent that she already  
15 knows what she would be relying on in terms of  
16 her threshold presentation, it might make more  
17 sense for us to trade initial disclosures and  
18 then a week later trade responses, so that we  
19 could look at one another's lists and have an  
20 opportunity to respond to them.

21           Because again, I -- I can let you  
22 know what we intend to put on, and Katie can  
23 respond to that, the inverse should also be  
24 true to some extent. It may not be exactly  
25 equal, but I think it might make more sense to

1 do it that way.

2 THE COURT: All right. So  
3 you'll both exchange initial disclosures on  
4 August 20th, and you're able to supplement  
5 those disclosures by August 27th.

6 MS. MULLIN: Okay, Judge.

7 THE COURT: And the other  
8 thing is, you know, I know this gets treated  
9 more like a civil case, but I don't want to  
10 see anybody, unless I have good reason from  
11 all of you, spending the entire month of  
12 September taking depositions. I mean, I think  
13 it should be as what is appropriate and  
14 necessary in the case.

15 I mean, again, I'll be happy to have  
16 any briefing from you guys, from all sides,  
17 but my understanding of what I've reviewed so  
18 far, the scope of what I'm allowed to consider  
19 is fairly narrow in this case.

20 MR. COHEN: Understood, Your  
21 Honor, good -- again, Harry Cohen -- and thank  
22 you for that.

23 THE COURT: Are there other  
24 issues?

25 MR. COHEN: This is Harry

1 again, I don't believe we have anything else,  
2 though Jim might or Liz or Mark. If you have  
3 anything else, just jump in.

4 MR. STRONSKI: Nothing right  
5 now, Your Honor. This is Jim Stronski.

6 MR. DEVAN: Nothing further.

7 THE COURT: Now, let me ask  
8 you guys, I don't know if it's going to create  
9 a problem in terms of your travel, we are set  
10 to start on Tuesday, October 14th, it's not a  
11 big deal here in Cleveland, Columbus Day or  
12 the day before. I don't know if that in any  
13 way, because of it being a long weekend, will  
14 cause travel issues for people.

15 I've got it set for 9:00 on the 14th.  
16 I'm delighted to stick with that time, but if  
17 you think it's going to create any issues, I  
18 can certainly start a little later, like  
19 10:00. Any preferences?

20 MR. COHEN: This is Harry.  
21 Again, I don't think the difference between  
22 9:00 and 10:00 will make much difference.

23 THE COURT: Okay. I'll  
24 leave it where it is then.

25 Anything else we need to discuss?

1                   MR. COHEN:                   Nope.

2                   THE COURT:                   I will put out  
3 an entry, kind of responding to what we all  
4 covered here today. If for some reason I've  
5 not done it accurately, I'm sure I'll hear  
6 from you.

7                   I appreciate you doing this and  
8 organizing the conference.

9                   I think what you suggested Harry, and  
10 everybody here, is narrowing down the scope of  
11 what we're going to deal with, which may make  
12 my job a little easier to handle, and I  
13 appreciate that.

14                   So unless I hear otherwise from  
15 everybody, any reason we should reschedule --  
16 do you want to have an interim telephone call,  
17 say the beginning of September or something  
18 like that, in case there's any issues that  
19 arise with regard to the disclosures?

20                   MR. COHEN:                   This is Harry, I  
21 think it probably makes more sense for us to  
22 see what transpires and then get in touch with  
23 you, if we need to take up your time.

24                   THE COURT:                   That's fine.  
25 You guys haven't been shy about it in the

1 past, so that's fine.

2 All right, well, I appreciate all of  
3 your time. Everybody have a pleasant evening,  
4 and I look forward to seeing you as we move  
5 forward on this.

6 Thanks much.

7 (Thereupon, Court was adjourned.)

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 10, 2016, the foregoing was filed electronically. A copy of the foregoing will be sent via U.S. Mail to Timothy J. McGinty, Cuyahoga County Prosecutor and T. Allan Regas, Assistant Cuyahoga County Prosecutor, Cuyahoga County Justice Center, 8<sup>th</sup> Floor, 1200 Ontario St. Cleveland, OH 44113.

s/ Mark R. DeVan  
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