Supreme Court of Ohio Clerk of Court - Filed June 20, 2016 - Case No. 2016-0696

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2016-0696
	:	
Plaintiff-Appellant,	:	On Appeal From the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
ANTHONY APANOVITCH,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case Nos. 102618 & 102698

MEMORANDUM IN SUPPORT OF JURISDICTION OF
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INTRODUCTION

Anthony Apanovitch raped and murdered Mary Ann Flynn in her own home. *State v. Apanovitch*, 33 Ohio St.3d 19 (1987). He was convicted of, among other things, murder, one count of oral rape, and one count of vaginal rape. *Id*. Years later, as part of Apanovitch's federal habeas corpus proceedings, DNA evidence from Flynn's body conclusively linked Apanovitch to the crime. As the Sixth Circuit Court of Appeals noted, in reference to that evidence, "[o]nly 1 in 285 million Caucasians have DNA consistent with that left by Flynn's killer, and Apanovitch is one such Caucasian." *Apanovitch v. Bobby*, 648 F.3d 434, 437 n. 2 (6th Cir. 2011).

Refusing to consider the evidence developed in federal court, a Cuyahoga County Court of Common Pleas granted Apanovitch's fourth petition for post-conviction relief, and the Eighth District Court of Appeals affirmed. *State v. Apanovitch*, 2016-Ohio-2831 (8th Dist.). The lower courts did more than simply grant Apanovitch a new trial, however. They also acquitted him of one count of rape and found that, because of a perceived error in the original indictment, double jeopardy principles barred his retrial on the other count of rape. *Id*.

The Court should review the Eighth District's decision below because the legal principles announced in that decision, if allowed to stand, could re-shape post-conviction proceedings throughout Ohio. Among other things, the Eighth District's decision shifted the burden in these proceedings so that the prosecutor bore the burden of defending Apanovitch's convictions. It also, for the first time, recognized a free-standing claim of actual innocence. And it expanded the type of relief that courts may grant should they find a petition well-taken, allowing them to affirmatively acquit a petitioner, not just order a new trial. Finally, it expanded the questionable double jeopardy analysis set out in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), a Sixth Circuit decision that has been criticized and that rests on a dubious foundation.

Standing alone, any one of these sweeping legal rules would warrant the Court's review. Taken together, they make the case for review here even more compelling.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law officer, and has a keen interest in decisions that limit the ability to prosecute crime. The Attorney General's office prosecutes crimes throughout Ohio and has a special interest in upholding lawful convictions. Prosecutors in Ohio, including attorneys employed by the Attorney General, work hard to see that justice is done; they are tasked with proving a defendant's guilt beyond a reasonable doubt. Once convicted, Ohio prosecutors should not have to shoulder the burden to reprove a defendant's guilt.

STATEMENT OF THE CASE AND FACTS

A. Anthony Apanovitch was convicted of the murder of Mary Ann Flynn and was sentenced to death; his sentence and convictions were affirmed on appeal.

On August 23, 1984, Mary Ann Flynn was brutally raped and murdered in her home. Flynn, a nurse at a local hospital, was found by her brother after she failed to show up for work. Evidence quickly mounted against Anthony Apanovitch, a convicted sex offender and thief, whom Flynn had hired to paint her home. The doors to Flynn's home were locked when Flynn was found, and the wood imbedded in Flynn matched the wood from the basement window that Apanovitch had offered to paint the day of the homicide. Officers discovered a contract for Apanovitch's previous work on the table at Flynn's home as well as cancelled checks made out to Apanovitch.

Six witnesses testified that Flynn was mortally afraid of Apanovitch and he had continuously harassed her before the murder. Flynn had repeatedly rebuffed Apanovitch's sexual advances. When questioned, Apanovitch admitted familiarity with Flynn's home but claimed he was at several bars throughout the night of the homicide. Apanovitch also stated he would not be surprised if they found his fingerprints inside Flynn's home, although he was only hired to do

exterior work. Employees from the various bars testified that Apanovitch was not there at the time of the homicide, however, and that Apanovitch had asked certain individuals to provide false alibi testimony for him. At the time of his arrest, Apanovitch had a scratch on his face consistent with a scratch caused by fingernails and officers discredited Apanovitch's story of how the scratch occurred. Semen, and other bodily fluids, were found inside Flynn's mouth and vagina.

Apanovitch was indicted with capitally-eligible aggravated murder (rape and burglary were the two aggravating circumstances), aggravated burglary, and two counts of rape. He was found guilty and sentenced to death. Apanovitch challenged his sentence and convictions. Both the Eighth District Court of Appeals and this Court affirmed Apanovitch's convictions on direct appeal. *State v. Apanovitch*, 8th Dist. Cuyahoga App No. 49772, 1986 WL 9503; *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 294 (1987). Apanovitch then engaged in extensive post-conviction litigation, including filing three petitions for post-conviction relief. *State v. Apanovitch*, 70 Ohio App.3d 759, 591 N.E.2d 1374 (8th Dist. 1991) (first petition); *State v. Apanovitch*, 107 Ohio App.3d 82, 667 N.E.2d 1041 (8th Dist. 1995) (second petition); *State v. Apanovitch*, 113 Ohio App.3d 591, 681 N.E.2d 961 (8th Dist. 1996) (third petition).

B. Apanovitch filed a petition for a writ of habeas corpus in federal court, and his petition was denied after a federal court ordered DNA testing.

After failing to obtain relief in state court, Apanovitch filed a habeas corpus petition in federal court. Originally believing that the swabs taken from Flynn had not been preserved, Apanovitch "demanded a DNA test of the supposedly-destroyed swabs, and claimed… that the state had violated his constitutional rights by not preserving the evidence." *Apanovitch v. Houk*, 466 F.3d 460, 489 (6th Cir. 2006). When, in 1992, Ohio informed the court, and parties, that "[t]race evidence slides" had been located for testing, Apanovitch changed his position and opposed any DNA testing. *Id*. at 470. Years later, on remand, the Sixth Circuit gave the district court discretion

to grant "the state's DNA request[.]" *Id*. Apanovitch objected to DNA testing at the time, arguing that the testing would be "inaccurate and unreliable, and…that the chain of custody is questionable." *Id*. at 489-90. The court also noted that Apanovitch "now denies that he is claiming actual innocence in order to avoid a DNA test," and that he had dropped the claim to "suit his tactical needs[.]" *Id*. at n. 10. On remand, the district court ordered DNA testing and held a hearing on the DNA evidence in which both the state and defense presented testimony. *Apanovitch v. Houk*, 2009 WL 3378250, *3 (N.D. Ohio 2009).

In 2007, DNA testing showed that Apanovitch could not be eliminated as the source of the sperm and that the genetic profile "shared by Anthony Apanovitch and the source of the spermatozoa from the …oral slide is expected to occur in approximately one out of 285 million members of the population." *Apanovitch v. Houk*, 2009 WL 3378250, *3 (S.D. Ohio). The district court granted "a hearing on Apanovitch's challenge to the chain of custody surrounding the evidence slides." *Id*. at *5. It found no evidence of tampering, rejected the allegation that "the chain of custody was not maintained[,]" and decided that "the chain of custody has not been altered." *Id*. at *8-9. The district court also concluded that the chain of custody for the DNA evidence was intact. *Id*. at *9. It ultimately held "that the weight of the evidence supports a determination that DNA taken from Apanovitch is comparative to the DNA found on the oral slide taken from the victim." *Id*. at *4.

After the district court's decision, Apanovitch filed a motion to alter or amend the judgment in which he "effectively argue[d] that he was precluded from challenging the results of [the] DNA report." *Apanovitch v. Houk*, 2009 WL 3246907. The district court found Apanovitch's argument "simply untrue" and noted that Apanovitch "had his own expert examine the results and opine on alleged inconsistencies and problems with the report." *Id*. at *2. The court noted that it was "able to

review the two reports, identify the arguments and findings contained in each, and reach a resolution." *Id*. Further foreclosing the issue, the court stated that "[n]o amount of testimony from the parties could alter the conclusions drawn by the Court based on the full reports provided by each side." *Id*. On appeal, the Sixth Circuit affirmed the denial of habeas relief. *Apanovitch v. Bobby*, 648 F.3d 434 (6th Cir. 2011). Although the court ultimately held that the district court should not have considered the DNA evidence as part of Apanovitch's *Brady* claim, the court noted that the DNA evidence was "highly inculpatory[.]" *Id*. at 437.

C. After his petition for a writ of habeas corpus was denied, Apanovitch filed his fourth petition for post-conviction relief in state court

Having been denied the relief he sought in federal court, Apanovitch returned to state court where he filed his fourth petition for post-conviction relief. Apanovitch did not seek DNA testing under Ohio's post-conviction DNA statute. *See* R.C. 2953.71 to 84. Instead, he sought relief under Ohio's regular post-conviction statute, raising a free-standing actual innocence claim. *See* R.C. 2953.21. A trial court granted relief, and the Eighth District affirmed, *State v. Apanovitch*, 8th Dist. App. Nos. 102618, 102698, 2016-Ohio-2831.

THIS CASE IS OF GREAT PUBLIC AND GENERAL INTEREST

Anthony Apanovitch was granted a new trial and released from prison despite numerous decision affirming his convictions and death sentence. The appellate court granted him relief despite the fact that the evidence of his guilt had actually gotten *stronger* since his conviction. *See Apanovitch v. Bobby*, 648 F.3d 434, fn. 2 (6th Cir. 2011) (noting that post-conviction DNA testing showed that "[o]nly 1 in 285 million Caucasians have DNA consistent with that left by Flynn's killer, and Apanovitch is one such Caucasian."). In doing so, it adopted several legal standards that, if adopted elsewhere, will hinder the ability of prosecutors in Ohio to maintain convictions. This Court's review of the Eighth District's decision grating relief is warranted for at least three reasons.

First, review is called for to address who bears the burden of proof necessary to sustain a petition for post-conviction relief. Once a defendant "has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853 (1993). A defendant that seeks to challenge his conviction is required to establish that "a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or Constitution of the United States." R.C. 2953.21(A). The State should not have been required to prove Apanovitch's guilt for a second time; his convictions were presumptively valid. *Bundy v. State*, 143 Ohio St.3d 237, 2015-Ohio-2138 ¶21. But the standard adopted by the Eighth District in this case required it to do just that—and, if it remains undisturbed, it will require the State to do the same in future cases as well.

Second, review is called for to address whether a claim of actual innocence may be raised in post-conviction proceedings and, if so, what relief is available to a petitioner who succeeds on such a claim. The trial court found Apanovitch "actually innocent" of one rape conviction and *sua sponte* vacated and acquitted him of a second. As a general matter, however, actual innocence may not be raised as a stand-alone claim in post-conviction proceedings. *State v. Watson*, 126 Ohio App.3d 316 (12th Dist. 1998). The only exception to this generally accepted principle is where a defendant has DNA testing performed pursuant to specific statutes. R.C. 2953.21(A)(1)(a); *see* R.C. 2953.71 to 84. But even under that statutory scheme, Apanovitch could have only obtain DNA testing "if there was no prior definitive DNA test[.]" *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764 ¶ 30. In this case however, there *had* been a prior DNA test—it was simply inculpatory, as the federal courts had held. *Apanovitch v. Bobby*, 648 F.3d 434, 437 (6th Cir. 2011).

The Eighth District's willingness to consider a free-standing actual innocence claim conflicts with decisions from nearly every other Ohio Appellate court. The vast majority of appellate courts

in Ohio, including the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh, have held that a claim of actual innocence based on newly discovered evidence does not provide substantive grounds for post-conviction relief.

Third and finally, the appellate court dismissed the second rape count on the basis of, *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), a decision that is not controlling and is of questionable persuasive value. As an initial matter, *Valentine* is a federal case, and is therefore not binding on Ohio courts. *State v. Burnett*, 93 Ohio St.3d 419, 424 (2001) (Ohio courts "not bound" by decisions of lower federal courts.) And even on its own terms, it is based on a shaky constitutional foundation. *See State v. Billman*, 7th Dist. App. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶34-35.

As with its willingness to entertain an actual innocence claim, the Eighth District's reliance on *Valentine* created a second appellate conflict. At least one Ohio appellate court has held that *Valentine* is "not good law" and need not be followed. *State v. Adams*, 7th Dist. Mahoning App. No. 13 MA 130, 2014-Ohio-5854, ¶36. Even the Eighth District has noted that *Valentine* "has been criticized for . . . 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 App No. 100337, 2014-Ohio-2393, ¶11.

ARGUMENT

***Amicus Curiae's* Proposition of Law 1:**

> *A petitioner bears the burden of proof in post-conviction proceedings to show that there was such a denial or infringement of the petitioner's rights as to render the judgment void or voidable under the Ohio or U.S. Constitution.*

A. The burden always lies with defendants to prove that their conviction are void or voidable in post-conviction proceedings.

Although criminal defendants are presumed innocent until proven guilty, once a conviction is obtained, the presumption of innocence is forever "altered with the guilty verdict and judgment." *Pannell v. United States*, 320 F.2d 698 (D.C. Cir. 1963). After the verdict, "a judgment cannot be lightly set aside by collateral attack" and "the judgment of a court carries with it a presumption of regularity." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). Consequently, "[a]fter conviction such presumption [of innocence] no longer exists; the accused has been found guilty, and burden is then upon the convicted felon to prove such conviction erroneous." *Coleman v. McGettrick*, 2 Ohio St.2d 177, 180 (1965).

Consistent with these principles, Ohio's post-conviction statute places the burden on an inmate to show "such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." *See* R.C. 2953.21(A)(1). In Ohio post-conviction proceedings, "the trial court has presumably been presented with evidence sufficient to support the original entry of conviction [.]" *Calhoun*, 86 Ohio St.3d at 284. When considering a postconviction claim, the trial court is obligated to consider the "petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings… including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript[.]" R.C. 2953.21(C) (emphasis added.) In fact, a trial court should deny a petition if "the supporting

affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun*, 86 Ohio St.3d at 291.

B. Apanovitch failed to carry his burden of showing that he was entitled to post-conviction relief.

Once Apanovitch was convicted by the State of Ohio, he was rightfully and "constitutionally deprived of his liberty." *Osborne*, 557 U.S. at 69. As a convicted inmate, Apanovitch bore the burden of submitting sufficient operative facts establishing a constitutional violation. *State v. Jackson*, 64 Ohio St.3d 107, 111-113 (1980). The Eighth District and the trial court both failed to ensure that Apanovitch carried that burden. Instead, they improperly shifted the burden to the state to dispute the inconclusive DNA tests performed on the vaginal slide. They ignored the contradictory (and inculpatory) DNA results from the oral slide, even though those results had been discussed in two federal court decisions, Apanovitch attached them to his petition, and made several arguments in that petition challenging their evidentiary value.

Those results were significant because DNA testing done on the oral slide in 2007 revealed that Apanovitch could not be excluded as the source of the sperm found in Flynn's mouth. The results were outlined in two federal court opinions, *Apanovitch v. Houk*, 2009 WL 3378250, *3 (S.D. Ohio), *Apanovitch v. Bobby*, 648 F.3d 434 (6th Cir. 2011), and Apanovitch himself submitted those reports as evidence attached to his post-conviction petition. Exhibit 1, Post-Conviction Petition. The courts below disregarded those conclusive DNA test results in favor of other subsequent testing of a weaker DNA sample, from a different part of the victim's body, that yielded multiple male profiles that had no nexus to the murder.

Apanovitch never successfully proved in state post-conviction that the oral swab did not link him to the crime. In fact, the defendant's witness agreed that the partial DNA profile developed

from the sperm cell fraction of Oral slide L90729 could have come from Anthony Apanovitch. *Apanovitch v. Houk*, 2009 WL 3378250, *4 (S.D. Ohio). Without any testimony to contradict the prior DNA evidence linking Apanovitch to the murder, the subsequent testing of the vaginal slide, even if accurate, was insufficient to prove his innocence. The state's expert testified that sperm can persist in the vagina up to five days after being deposited, but only a matter of hours in the mouth. In other words, unlike the sperm found in Flynn's vagina, the sperm found in her mouth had to have been deposited contemporaneously with her murder. The DNA collected from the vaginal slide proves, at most, that she had sexual contact with an unknown male as much as five days prior to her death.

Because the state already possessed a presumptively valid state court judgment, and federal court decisions discussing the inculpatory nature of the DNA evidence collected from Flynn's oral cavity, it was under no obligation to secure any witnesses or present any evidence. It was incumbent on Apanovitch, not the State, to subpoena Dr. Blake, for the purpose of challenging his 2007 DNA findings regarding the oral slide. Instead of holding Apanovitch to his burden, however, the trial court and the Eighth District improperly concluded that it was the *State's* obligation to secure the presence of Dr. Blake.

***Amicus Curiae's* Proposition of Law 2:**

> *A claim of actual innocence is not cognizable in post-conviction proceedings and a post-conviction court may not acquit a petitioner of an offense for which he has been tried and convicted.*

Apanovitch's petition for post-conviction relief raised a free-standing claim of actual innocence; that is, his petition argued that he was not responsible for Flynn's rape and murder. Post-Conviction Petition, pg. 25-26. By even considering such a claim, the Eighth District created a significant legal conflict with itself and other Ohio Appellate courts. The concept of post-conviction

"actual innocence" claims has been rejected by every Ohio court to decide the issue. Ohio's lower appellate courts have universally rejected free-standing claims of actual innocence. *State v. Byrd*, 145 Ohio App.3d 318, 330 (1st Dist. 2001); *State v. Keith*, 176 Ohio App.3d 260, 274, 2008-Ohio-741 ¶47 (3rd Dist.); *State v. Harrington*, 172 Ohio App.3d 595, 2007-Ohio-3796 ¶18 (4th Dist.); *State v. Bound*, 2004-Ohio-7097 (5th Dist.); *State v. Willis*, 2016-Ohio-335, ¶19 (6th Dist.); *State v. Weaver*, 9th Dist. Lorain App. No. 97CA006686, 1997 WL 823965 at *11-12; *State v. Burke*, 10th Dist. Franklin App. No. 99AP-174, 2000 WL 190569 at *9; *State v. Noling*, 2003-Ohio-5008 ¶46 (11th Dist.); *State v. Watson*, 126 Ohio App.3d 316 (12th Dist. 1998). And the Eighth District itself has held that "a claim of actual innocence…does [not] constitute a substantive ground for post-conviction relief." *State v. Hines*, 8th Dist. App. No. 89848, 2008-Ohio-1927, ¶24.

In the context of DNA evidence, R.C. 2953.21(A)(1)(a) creates a limited actual innocence claim for petitioners who show can show that new DNA evidence establishes, by clear and convincing evidence, that they were actually innocent of the crime for which they were convicted. An actual innocence claim under R.C. 2953.21(A)(1)(a) requires courts to consider all the other evidence related to a conviction—including but not limited to, other DNA test results. *See* R.C. 2953.74(D). Apanovitch did not qualify for the actual innocence exception found in R.C. 2953.21(A)(1)(a) because he argued that the courts below should *ignore* other available evidence, not consider it.

Even assuming that an actual innocence claim *is* cognizable in post-conviction proceedings (and assuming that Apanovitch properly presented such a claim in this case), acquittal is not, and cannot be, the appropriate remedy. The only basis for a reviewing court to grant an acquittal after trial is if it concludes that there was insufficient evidence to support the conviction. *See Jackson v. Virginia*, 443 U.S. 307, 321 (1979). But an insufficiency of the evidence claim focuses on *record*

evidence, which can and should be challenged in a direct appeal, not a postconviction proceeding. *See State v. Szefcyk*, 77 Ohio St. 3d 93, 95 (1996) (res judicata bars a petitioner from raising claims in postconviction proceedings that could have been raised on direct appeal).

The U.S. Supreme Court has declined to recognize a free-standing actual innocence claim in federal habeas proceedings in part because of concerns about remedy should a petitioner prevail. *See Herrera*, 506 at U.S. 402. (petitioner was "understandably imprecise in describing the sort of federal relief to which a suitable showing of actual innocence would entitle him"). It noted that "*Jackson* does not extend to nonrecord evidence, including newly discovered evidence." *See id.* And it suggested that before a habeas court could grant relief on an actual innocence claim it would have to, among other things, "hear testimony from the witnesses who testified at trial." *Id.* Although state postconviction proceedings differ in many ways from federal habeas proceedings, these concerns apply with similar force here.

Ohio's statutes and rules governing post-conviction proceedings similarly limit the relief available in post-conviction proceedings. For example, R.C. 2953.21(G) states that if a court finds grounds for granting relief it may vacate and set aside a judgment, and that it may "make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail." Nowhere does it state that a post-conviction court may *acquit* a petitioner. *See id.* A court's power to grant relief under Crim. R. 33 is similarly limited. It provides only that "[a] *new trial* may be granted" if a defendant establishes one of six different causes of action. Crim. R. 33(A) (emphasis added). To the extent that Crim. R. 33 allows for any other type of relief it is only in the context of lesser included offenses. *See* Crim. R. 33(A)(4) (stating that a court may modify a verdict to reflect a lesser offense without granting or ordering a new trial). But Apanovitch did not

argue below that he should have been convicted only of a lesser offense, and a court's limited power to enter a conviction on that basis is not implicated here.

***Amicus Curiae's* Proposition of Law 3:**

> *Double jeopardy cannot bar retrial of a petitioner who successfully obtains post-conviction relief.*

Even assuming that the Eighth District could consider Apanovitch's post-conviction claims, it could not bar his retrial on the basis of the Double Jeopardy Clause. The Double Jeopardy Clause only precludes retrial "if the reversal was based upon a finding that the evidence was legally insufficient to support the conviction." *State v. Thompkins*, 78 Ohio St. 3d 380, 387 (1997). But, as discussed above, there is no question that a jury convicted Apanovitch of two counts of rape, and the Court rejected claims of sufficiency of the evidence decades ago. *State v. Apanovitch*, 33 Ohio St.3d 19, 20 (1987); *see also*, *Apanovitch v. Houk*, 466 F.3d 460, 489 (6th Cir. 2006) ("[A] reasonable juror could have found that Apanovitch murdered Flynn while committing or attempting rape or burglary.")

To get around established Double Jeopardy Clause jurisprudence, the lower courts in this case relied on *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), a Sixth Circuit decision that is both non-binding on Ohio courts and of questionable merit. When it granted relief, the trial court *sua sponte* raised *Valentine*. It did so because, even assuming Apanovitch's vaginal rape charge was problematic, he still had a valid conviction for the oral rape. Relying on *Valentine*, however, the trial court insisted that because it could not distinguish between the two rape counts, it was forced to acquit Apanovitch of both counts once it acquitted him of the vaginal rape. In other words, the trial court concluded that because the State failed to delineate between the two acts of rape in either the indictment or the bill of particulars in 1986, it was now required to acquit on both counts of rape

under *Valentine*. The *Valentine* decision, however, has not just been universally criticized; it is also distinguishable in this case.

Valentine has been subject to criticism since its inception. *See State v. Adams*, 7th Dist. No. 13 MA 130, 2014-Ohio-5854, ¶36 ("*Valentine* is not good law and we need not follow it[.]"); *see*, *Ballard v. Dilworth*, 739 S.E.2d 643, 651 (W. Va. 2013) (West Virginia Supreme Court found *Valentine* unpersuasive stating it had found "no other federal circuit court of appeals that had followed *Valentine* to grant habeas relief to a state prisoner under similar circumstances") Even the Eighth District itself has previously held 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 'distinguishable in every subsequent Sixth Circuit decision that cites it on this issue." *State v. Schwarzman*, 8th Dist. No. 100337, 2014-Ohio-2393, ¶11.

But even if *Valentine* does apply, Apanovitch's argument fails on its own terms; *Valentine* is distinguishable from the present matter. In *Valentine*, the Sixth Circuit granted habeas relief because the indictment failed to provide the defendant notice of individual dates for forty separate rape counts, when the defendant raped his victim numerous times over a ten month period. *Valentine,* at 363. According to the Sixth Circuit's analysis, *Valentine* was "prosecuted and convicted for a generic pattern of abuse rather than for forty separate abusive incidents." *Id*. at 634. According to *Valentine*, an indictment charging multiple counts of identical worded charges violated due process because it failed to provide the defendant notice of multiple incidents without specificity in the indictment, and thus, he was subject to double jeopardy. *Id*. at 628. The lack of differentiation between the 40 counts of sexual abuse was the key factor in the *Valentine* court's analysis. *Id.* at 636. The Sixth Circuit noted any defect in the *Valentine* indictment "might have been cured had the

trial court insisted that the prosecution delineate the factual basis for the forty separate incidents either before or during trial." *Id*. at 634.

That is precisely what happened in this case: The evidence at trial delineated between the two rape counts, one of which involved an oral rape and the other a vaginal rape. There was undisputed testimony at trial that sperm was found in both Flynn's mouth and her vagina and the jury was instructed on both definitions of rape. Tr. 805-06, 2260-61. Thus it was obvious to the trial judge, the jury, and the parties, that one rape referred to vaginal intercourse and other rape charge referred to oral rape. Because these rapes occurred to the same victim, on the same night and because the trial evidence distinguished between each count, *Valentine* simply does not support Apanovitch's claim that the Double Jeopardy Clause bars his retrial on both counts of rape.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction over this case and reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Support of Jurisdiction was served upon the following attorneys by email this 20th day of June 2016:

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