

THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

v.

ANTHONY APANOVITCH

Defendant-Appellee.

Case No. 2016-0696

On Appeal from the Court of Appeals
Of Ohio, Eighth Appellate District,
Cuyahoga County

Court of Appeals Case Nos. 102618
And 102698

**MEMORANDUM IN OPPOSITION
OF APPELLEE ANTHONY APANOVITCH**

Counsel for Defendant-Appellee

MARK R. DEVAN (0003339)

(counsel of record)

mdevan@bgmdlaw.com

WILLIAM C. LIVINGSTON (0089538)

wlivingston@bgmdlaw.com

Berkman, Gordon, Murray & DeVan

55 Public Square, Suite 2200

Cleveland, Ohio 44113

(216) 781-5245

Counsel for Plaintiff-Appellant

TIMOTHY J. MCGINTY

CUYAHOGA COUNTY PROSECUTOR

CHRISTOPHER D. SCHROEDER (0089855)

(counsel of record)

MATTHEW E. MEYER (0075253)

T. ALLAN REGAS (0067336)

Assistant Prosecuting Attorneys

The Justice Center

1200 Ontario Street

Cleveland, Ohio 44113

(216) 443-7733

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
I. SUMMARY OF THE ARGUMENT	1
II. COUNTER STATEMENT OF THE CASE AND FACTS.....	4
A. In 1984, Mr. Apanovitch Was Convicted Based on a Weak Circumstantial Case. 4	4
B. In 2015, the Trial Court Granted Post-Conviction Relief to Mr. Apanovitch Following An Evidentiary Hearing On New DNA Evidence.....	12
1. In 2008, the State disclosed that it had wrongfully withheld DNA testing from the Defense for nearly a decade.	12
2. The trial court evaluated the testimony of DNA experts and properly found that new DNA testing conducted by the State excluded Mr. Apanovitch as the source of sperm from the victim’s vagina at autopsy. 14	14
3. The trial court thoroughly considered the entire trial record and applied the correct standard, in view of the new DNA evidence, to find that Mr. Apanovitch had proven actual innocence of vaginal rape, and thus was entitled to an acquittal on that count, dismissal of the remaining rape count, which included the same charge of vaginal rape, and a new trial on the murder charge.	17
C. The Trial Court Properly Declined to Consider Unsworn, Unauthenticated FSA Reports, Which the Prosecution Stipulated Would Not Be Introduced as Evidence or Relied upon in Connection with These Proceedings.....	20
D. The Eighth District Unanimously Affirmed the Trial Court Decision.	24
E. This Court Denied the State’s Emergency Motion to Stay Mr. Apanovitch’s Release.	26
III. ARGUMENT FOR DENIAL OF THE PENDING APPLICATION FOR JURISDICTION	26
A. Appellee’s Response to the State’s Proposition of Law I: The District Court’s Statements about DNA Evidence at Best Constitute <i>Dicta</i> That Is Not Entitled to <i>Res Judicata</i> Treatment.....	26
1. The admissibility, authenticity, and credibility of the DNA evidence have never been “actually and necessarily litigated.”	28
2. Consideration of the DNA evidence and FSA reports was not necessary to the decisions of the district court or the Sixth Circuit.	30
3. The district court’s decision was not a final judgment.	32
4. The issue in the prior action was not identical to the issue before the trial court.	34

B.	Appellee’s Response to State’s Proposition of Law II: There Is No Reasonable Question That DNA Testing on Sperm Samples Taken from the Vagina at Autopsy Excluded Mr. Apanovitch as the Source and Required Acquittal Because Those Samples Were the Sole Basis for the Vaginal Rape Conviction at Trial. . .	35
C.	Appellee’s Response to State’s Proposition of Law III: There Was No Issue of Defective Indictment Raised below or Potentially before This Court; Instead, the Court of Appeals Applied Basic Principles of Double Jeopardy after Mr. Apanovitch Was Excluded as the Source of Sperm in the Vagina of the Victim.	39
D.	Appellee’s Response to State’s Proposition of Law IV: Where Mr. Apanovitch Was Excluded as the Source of the Sperm in the Victim’s Vagina at Autopsy, Basic Concepts of Double Jeopardy Bar Re-trial for the Same Act of Vaginal Rape.	44
E.	Appellee’s Response to <i>Amicus Curiae’s</i> Proposition of Law 1: Mr. Apanovitch Bore the Burden of Proof and Carried That Burden. There Was No Improper Burden Shifting Below. This Issue Was Not Raised below, and Should Be Deemed Waived.....	45
F.	Appellee’s Response to <i>Amicus Curiae’s</i> Proposition of Law 2: Mr. Apanovitch’s Actual-Innocence Claim Is Statutory under R.C. 2953.21(A)(1)(a) Based on Exculpatory DNA Evidence Not Available at Trial. There Is No Question or Conflict Among the Courts of Appeal that This Statutory Claim Exists; The State’s Argument Based on Non-DNA-Based Innocence Claims Is Therefore Inapposite. Moreover, It Was Not Raised below, and Should Be Deemed Waived.	52
	1. Mr. Apanovitch raised his actual-innocence claim under the DNA-based actual-innocence provision of Ohio’s post-conviction-remedy statute; the <i>Amicus</i> , however, relies on court rulings relating to <i>non</i> -DNA petitions to assert that Ohio courts do not accept freestanding claims of actual innocence.	53
	2. The <i>Amicus</i> incorrectly asserts that Apanovitch cannot meet the DNA-based actual-innocence provision because he asked the trial court to ignore evidence related to his claim of actual innocence. But Apanovitch presented—and the court reviewed—all admissible evidence.	55
	3. The trial court properly acquitted Apanovitch on the one charge for which clear and convincing evidence supported a claim of innocence and dismissed a carbon copy claim to avoid double jeopardy; the court left intact all remaining charges not related to rape. The State is free to retry Apanovitch on the remaining matters.	56
G.	Appellee’s Response to <i>Amicus Curiae’s</i> Proposition of Law 3: Basic Principles of Double Jeopardy Bar Retrial by the State of Ohio for A Crime on Which There Was an Acquittal, and These Principles Were Applied by the Trial Court, and Affirmed by The Eighth District Court of Appeals by Unanimous Opinion.....	58
IV.	CONCLUSION.....	59

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Akron v. Jaramillo</i> , 97 Ohio App. 3d 51 (Ct. App. 9th Dist. 1994).....	43
<i>Apanovitch v. Bobby</i> , 648 F.3d 434 (6th Cir. 2011)	<i>passim</i>
<i>Apanovitch v. Houk</i> , 466 F.3d 460 (6th Cir. 2006)	<i>passim</i>
<i>Apanovitch v. Tate</i> , No. 1:91-CV-2221, Doc# 135, slip op. at 1 (N.D. Ohio filed Oct. 8, 2008).....	14, 42
<i>In re Baylis</i> , 217 F.3d 66 (1st Cir. 2000).....	33
<i>Collins v. Collins</i> , No. 58035, 1991 WL 12936 (Ohio Ct. App. 8th Dist. Feb. 7, 1991)	50, 51
<i>State ex rel. Davis v. Pub. Emps. Ret. Bd.</i> , 120 Ohio St. 3d 386, 2008-Ohio-6254, 899 N.E.2d 975 (2008).....	33
<i>Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.</i> , 519 F.3d 421 (8th Cir. 2008)	33
<i>Goodson v. McDonough Power Equip., Inc.</i> , 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983)	33, 34
<i>Hack v. Gillespie</i> , 74 Ohio St. 3d 362, 658 N.E.2d 1046, 1996-Ohio-167 (1996).....	45, 52
<i>Johnston v. Great Lakes Constr. Co.</i> , No. 95CA006111, 1996 WL 84632 (Ohio Ct. App. 9th Dist. Feb. 28, 1996).....	49, 51
<i>Kelly v. Georgia-Pac. Corp.</i> , 46 Ohio St. 3d 134 (1989).....	31, 32, 33
<i>McIntyre v. Arrow Int'l, Inc.</i> , 2007-Ohio-712 (Ct. App. 8th Dist. 2007).....	49
<i>Moreland v. Ksiazek</i> , 2004-Ohio-2974 (Ct. App. 8th Dist. 2004).....	49

<i>Mt. Pleasant Volunteer Fire Dep't v. Stuart</i> , 2002-Ohio-5227 (Ct. App. 7th Dist. 2002).....	50
<i>Ohio v. Apanovitch</i> , Nos. 102618 and 102698, slip op. (Ohio Ct. App. 8th Dist. filed May 5, 2016).....	<i>passim</i>
<i>In re PCH Assocs.</i> , 949 F.2d 585 (2d Cir. 1991).....	33
<i>Powell v. Wal-Mart Stores, Inc.</i> , 2015-Ohio-2035 (Ct. App. 8th Dist.), <i>appeal not allowed</i> , 144 Ohio St. 3d 1427 (2015).....	28, 30, 34
<i>State ex rel. Schachter v. Ohio Pub. Emps. Ret. Bd.</i> , 121 Ohio St. 3d 526, 2009-Ohio-1704, 905 N.E.2d 1210 (2009).....	28
<i>State v. Apanovitch</i> , 33 Ohio St. 3d 19 (1987).....	5, 8
<i>State v. Bound</i> , 2004-Ohio-7097 (Ct. App. 5th Dist. 2004).....	54
<i>State v. Broughton</i> , 62 Ohio St. 3d 253 (1991).....	43
<i>State v. Burke</i> , No. 99-AP-174, 2000 WL 190569 (Ohio Ct. App. 10th Dist. Feb. 17, 2000).....	54
<i>State v. Byrd</i> , 145 Ohio App. 3d 318 (Ct. App. 1st. Dist. 2001).....	54
<i>State v. Chapman</i> , No. CA94-04-004, 1994 WL 650065 (Ohio Ct. App. 12th Dist. Nov. 21, 1994).....	47
<i>State v. Greer</i> , No. 15217, 1992 WL 316350 (Ohio Ct. App. 8th Dist. Oct. 28, 1992).....	48
<i>State v. Harder</i> , No. 9-83-26, 1984 WL 8092 (Ohio Ct. App. 3d Dist. Oct. 9, 1984).....	47
<i>State v. Harrington</i> , 172 Ohio App. 3d 595, 2007-Ohio-3796, 876 N.E.2d 626 (Ct. App. 4th Dist. 2007).....	50, 54
<i>State v. Hines</i> , No. 89848, 2008-Ohio-1927 (Ct. App. 8th Dist. 2008).....	54

<i>State v. Holder</i> , 2008-Ohio-1271 (Ct. App. 8th Dist. 2008).....	40
<i>State v. Jackson</i> , 2011-Ohio-5920 (Ct. App. 8th Dist. 2011).....	40
<i>State v. Keith</i> , 176 Ohio App. 3d 260, 2008-Ohio-741, 891 N.E.2d 1191 (Ct. App. 3d Dist. 2008).....	53, 54
<i>State v. Lloyd</i> , 8 Ohio App. 2d 155 (4th Dist. 1966).....	47
<i>State v. McKnight</i> , 2008-Ohio-2435 (Ct. App. 4th Dist. 2008).....	51
<i>State v. Noling</i> , 2003-Ohio-5008 (Ct. App. 11th Dist. 2003).....	54
<i>State v. Ogle</i> , 2007-Ohio-5066 (Ct. App. 8th Dist. 2007).....	16, 40, 41, 43
<i>State v. Prade</i> , 2014-Ohio-1035, 9 N.E.3d 1072 (Ct. App. 9th Dist.), <i>appeal not allowed</i> , 139 Ohio St. 3d 1483 (2014).....	36
<i>State v. Shinn</i> , No. 99CA29, 2000 WL 781106 (Ohio Ct. App. 4th Dist. June 14, 2000).....	43
<i>State v. Szeftcyk</i> , 77 Ohio St. 3d 93 (1996).....	57
<i>State v. Taborn</i> , No. 77650, 2000 WL 1739299 (Ohio Ct. App. 8th Dist. Nov. 22, 2000).....	49, 51
<i>State v. Tate</i> , 140 Ohio St. 3d 442, 2014-Ohio-3667, 19 N.E.3d 888 (2014), <i>appeal not allowed</i> , 143 Ohio St. 3d 1404 (2015).....	42, 43
<i>State v. Trimble</i> , 2008-Ohio-6409 (Ct. App. 11th Dist. 2008).....	50, 51
<i>State v. Watson</i> , 126 Ohio App. 3d 316 (Ct. App. 12th Dist. 1998).....	54
<i>State v. Weaver</i> , No. 97CA006686, 1997 WL 823965 (Ohio Ct. App. 9th Dist. Dec. 31, 1997).....	54

<i>State v. Wheeler</i> , 2015-Ohio-3231 (Ct. App. 8th Dist. 2015), <i>appeal allowed</i> , 144 Ohio St. 3d 1458, 2016-Ohio-172, 44 N.E. 3d 287 (2016) (reversed on other grounds).....	42
<i>State v. Willis</i> , 2016-Ohio-335 (Ct. App. 6th Dist.), <i>appeal not allowed</i> , 146 Ohio St. 3d 1415 (2016).....	54
<i>State v. Winston</i> , No. C.A. L-80-223, 1981 WL 5645 (Ohio Ct. App. 6th Dist. June 12, 1981)	47
<i>State v. Wright</i> , 2009-Ohio-4651 (Ct. App. 10th Dist. 2009).....	50, 51
<i>Teamster Hous., Inc. v. McCormack</i> , No. 69583, 1996 WL 239998 (Ohio Ct. App. 8th Dist. May 9, 1996).....	51
<i>Valentine v. Konteh</i> , 395 F.3d 626 (6th Cir. 2005)	3, 39, 44, 58
Statutes	
Ohio Rev. Code § 2953.21	<i>passim</i>
Ohio Rev. Code § 2953.23.....	4, 52
Ohio Rules of Criminal Procedure Rule 33	<i>passim</i>
Other Authorities	
Wright, Miller, Cooper, 18A Fed. Prac. & Proc. Juris. § 4432	33
53 Ohio Jur. 3d Habeas Corpus § 115	48
Restatement (Second) of Judgments § 27 (1982).....	33

I. SUMMARY OF THE ARGUMENT

The *sole* issue presented by the State’s application for jurisdiction is whether this case presents a constitutional question or an issue of public or great general interest. Remarkably, in its Application, the State never actually articulates how or why this standard is satisfied. Instead, the State’s Application is replete with false and inappropriate assertions about Mr. Apanovitch. Indeed, the State appears to be attempting to overcome with emotion what it cannot establish factually or legally.

As the State knows, however, based on “*uncontroverted*” and “*unequivocal*” evidence, the trial court (which actually saw and heard the evidence) acquitted Mr. Apanovitch of vaginal rape, vacated the prior verdict in its entirety, and granted Mr. Apanovitch a new trial. Those factual and legal findings were unanimously affirmed by the Eighth District Court of Appeals. Mr. Apanovitch has thus spent over three decades in prison for a crime he conclusively did not commit, and for other crimes for which, in the face of his vacated convictions, he is now presumed innocent. Although Mr. Apanovitch remains under indictment for the remaining charges, he is indisputably entitled to all Constitutional presumptions, including the presumption of innocence. Under the circumstances, the State’s repeated assertions that Mr. Apanovitch is a convicted murderer and rapist and presents a threat to society are false and irresponsible. At this point, the State’s only legitimate option is to proceed to trial, if it elects to do so. But the State simply has not satisfied its burden of demonstrating a jurisdictional basis for appeal.

As summarized below, each of the arguments advanced by the State (and *Amicus Curiae*) lacks merit under Ohio law, has no basis on the record, and was properly rejected by the courts below. Moreover, several of these arguments were never raised below and thus have been waived.

1. State's Proposition of Law I (“*res judicata*”). The State's first basis for jurisdiction is that the trial court (and the appellate court) failed to apply *res judicata*. The State does not explain how or why this putative error constitutes a constitutional question, or an issue of public or great general interest. Nor could it. In any event, this argument is meritless. In the proceeding below, the State actively prevented Mr. Apanovitch from seeking discovery regarding allegedly inculpatory expert reports from a third party laboratory, Forensic Science Associates (“FSA”). Rather than permit Mr. Apanovitch's counsel to depose the purported author of these reports, the State stipulated that it would neither introduce nor rely upon the reports in this proceeding. Regretting its tactical decision, the State now argues that the trial court should have accorded *res judicata* effect to the alleged conclusions of the FSA reports because they were discussed, *in dicta*, in a district court opinion in Mr. Apanovitch's federal *habeas* proceedings. But the contents and value of the FSA reports were never litigated in the district court, and the district court did not reach any factual findings regarding the FSA reports, which have never been admitted into evidence in any evidentiary hearing, and have never even been *authenticated* by their alleged author. Moreover, on appeal, the Sixth Circuit expressly chastised the district court for even discussing these reports, holding that they were irrelevant to Mr. Apanovitch's *habeas* proceeding. The State's argument is meritless and patently disingenuous.

2. State's Proposition of Law II (the putative missing “evidentiary link”). In its second proposition of law, the State argues that Mr. Apanovitch's conviction for vaginal rape should stand in the face of unequivocal DNA evidence precluding his guilt as a matter of forensic certainty. Here, too, the State does not attempt to explain how these arguments present a constitutional question, or an issue of public or great general interest. Regardless, the

arguments are baseless. In 1984, Mr. Apanovitch was charged with vaginal rape based solely on the discovery of sperm in the victim's vagina, which led the Coroner to conclude that the perpetrator had non-consensual vaginal intercourse with the victim. Three decades later, DNA testing has unequivocally established that Mr. Apanovitch is not the source of sperm found in the victim's vagina. The State's arguments are wrong as a matter of law and defy common sense.

3. State's Proposition of Law III/*Amicus Curiae's* Proposition of Law III ("defective indictment"). The State and *Amicus* each contend that the lower courts improperly decided a "defective indictment claim" under *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005). However, neither court applied *Valentine* as controlling authority, and neither issued any decision based on the indictment having been defective at the time of trial.

4. State's Proposition of Law IV ("multiple identical counts"). Seeking to avoid a constitutional violation of its own making, the State argues that it would be constitutional to retry Mr. Apanovitch on one of the two carbon copy counts of rape by "vaginal intercourse and/or fellatio" contained in his original 1984 indictment. The State's argument is meritless. Mr. Apanovitch has now been acquitted of vaginal rape, and the State is seeking a new trial on a count that, on its face, *alleges rape by vaginal intercourse, the precise conduct for which Mr. Apanovitch has now been acquitted.* Such a decision would violate the very essence of the prohibition on double jeopardy, which is precisely why the trial court dismissed the remaining count.

5. *Amicus Curiae's* Proposition of Law I ("burden shifting"). In an argument not raised in the appellate court below (and thus waived), the *Amicus* Brief ("*Amicus* Br.") erroneously claims that the trial court shifted the burden of proof from Mr. Apanovitch to the State. *Amicus* Br. at 1, 9-10. To the contrary, the trial court expressly applied the appropriate

burden and standards required under Ohio Rev. Code § 2953.21, and found that Mr. Apanovitch met his burden by submitting uncontested and unequivocal expert testimony exonerating him of vaginal rape as a matter of forensic certainty.

6. *Amicus Curiae's* Proposition of Law II (“statutory claim”). In another argument not raised in the appellate court below (and thus waived), the *Amicus* Brief alleges that an actual innocence claim was not available to Mr. Apanovitch because Ohio Rev. Code § 2953.21(A)(1)(a) did not apply to the proceeding below. *Amicus* Br. at 10-13. This inexplicable assertion flies in the face of the record in this case, in which it was expressly noted before, during, and after the evidentiary hearing that Mr. Apanovitch was “seeking relief under R.C. 2953.23 and 2953.21 based upon the DNA evidence,” that 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,” and that Mr. Apanovitch satisfied his burden under Ohio Rev. Code § 2953.21, which “set[] forth the standards to be considered by the trial court and the available means of disposition of the case.” *See* Findings of Fact, Conclusions of Law and Opinion on Post Conviction Relief, dated February 12, 2015 (“Trial Op.”) at 5.

In sum, the State’s Application is unsupported and insupportable. This case raises no constitutional questions or issues of public or great general interest. The court should deny the State’s Application.

II. COUNTER STATEMENT OF THE CASE AND FACTS

A. In 1984, Mr. Apanovitch Was Convicted Based on a Weak Circumstantial Case.

Decades before DNA evidence unequivocally exonerated him, Mr. Apanovitch was convicted and sentenced to death based solely on weak and inconclusive circumstantial evidence. Indeed, in 1987, a three-justice minority of this Court refused to affirm Mr. Apanovitch’s death

sentence because “the evidence of guilt in this case . . . [wa]s far from overwhelming,” and, based on the limited and circumstantial nature of the evidence, “there [wa]s a substantial possibility that the defendant *may* not be guilty.” *State v. Apanovitch*, 33 Ohio St. 3d 19, 29 (1987) (emphasis in original). Thus, even in 1987, before the revelation of significant prosecutorial misconduct and exculpatory DNA evidence, three members of this Court flagged Mr. Apanovitch’s conviction as suspect and deemed the State’s case to be weak and wholly circumstantial. Contrary to the State’s misleading portrayal (one devoid of citations to the record), the evidence underlying Mr. Apanovitch’s conviction was weak in 1984, and has been fully discredited in the decades since.

On August 24, 1984, Mary Anne Flynn was found deceased in her second-floor bedroom. *See Apanovitch v. Houk*, 466 F.3d 460, 463 (6th Cir. 2006). Within days of the murder, Cleveland police targeted Mr. Apanovitch as a potential suspect because he sometimes did odd jobs and house painting, and Ms. Flynn had expressed to a friend that she was fearful of someone who had done painting at her house. *Id.* at 464. Over the next several days, Mr. Apanovitch was interviewed several times by several different Cleveland police officers and detectives. *Id.* 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 subsequently tested several articles of Mr. Apanovitch’s clothing. *Id.* at 465.

On October 2, 1984, a grand jury returned an indictment for aggravated murder, rape and burglary. Mr. Apanovitch voluntarily surrendered that same day. *Id.* Only fifty-five days later, on November 26, 1984, the case went to trial. *Id.*

The State's theory at trial was that Mr. Apanovitch, acting alone, raped and murdered Ms.

Flynn:

- On the evening of August 23, 1984 or the early morning hours of August 24, 1984 (the State was not sure when), Mr. Apanovitch somehow (the State was not sure how) unlawfully entered Ms. Flynn's home.
- At some point (the State was not sure when), Mr. Apanovitch retrieved a portion of Ms. Flynn's basement window sill.
- Mr. Apanovitch beat Ms. Flynn, raped Ms. Flynn, stabbed her with a piece of the basement window sill, and strangled her to death.
- Mr. Apanovitch escaped Ms. Flynn's home through a basement window.

(Ex. 1¹ (Trial Tr. (State Opening) at 722-37); Ex. 1 (Trial Tr. (State Closing) at 2180-2234.)

The State's evidence at trial was incredibly thin, and consisted of the following:

- *Mr. Apanovitch's Secretor Status.* Seeking to connect Mr. Apanovitch to the victim, Barbara Campbell of the Trace Evidence Department (which collects the forensic evidence) testified that body fluid found in the victim's vagina was from an A-type secretor, and that Mr. Apanovitch was an A-type secretor. (*Id.* at Ex. 1 (Trial Tr.) at 828-29.)
- *Alleged Inculpatory Statement.* Seeking to paint the inference that Mr. Apanovitch implicated himself in the murder, Detective Zalar testified that Mr. Apanovitch asked for the opportunity to call his mother "when" he was indicted. The comment allegedly "stunned" the Detective, and the State characterized it as "extremely important," and an effective admission of guilt. (*Id.* at 1506-07; 2226.)
- *Scratch on Mr. Apanovitch's Face.* Seeking to identify Mr. Apanovitch as the killer, the State argued that a scratch on the left side of Mr. Apanovitch's face was consistent with that of a scratch from a fingernail. (*Id.* at 777-79; 807-08.)
- *Putative Lack of an Alibi.* The State argued that Mr. Apanovitch provided inconsistent stories about his whereabouts on the night of the murder. (*Id.* at 1142, 1144-45 (Det. Simone); 1623-27 (Det. Adrine); 1686-87 (Det. Reese); 1437-40 (Det. Zalar); 1871-72 (Det. Bornfeld).)

¹ Citations preceded by "Ex." are to the Joint Hearing Exhibits that were admitted into evidence by the trial court by stipulation of the parties. (*See* Court Exhibits, Item 4).

- *Means/Access.* A signed agreement to paint a portion of the victim's house was found on the kitchen table the day after the murder was discovered, and Mr. Apanovitch was familiar with the layout of the victim's house and had spoken with the victim on the day of the murder. (*Id.* at 1064-66; 1463; 1622-23.)
- *Motive.* Mr. Apanovitch had expressed sexual interest in Ms. Flynn, and Ms. Flynn had told a friend she was fearful of a "painter." (*Id.* at 1037-38.)

Significantly, the two pieces of physical evidence presented at trial – a hair found on the victim that did not belong to either the victim or Apanovitch, and the blood-type secretor status of fluids taken from the victim's vagina – were the subject of serious misconduct by the State. The State admitted at trial that it located a black hair that – importantly – could not possibly have come from Mr. Apanovitch or Ms. Flynn, the clear implication being that the hair must have come from another person, presumably the actual perpetrator. The State misled the jury when it claimed that the hair was found "in the area of her hand" (Ex. 1 (Trial Tr. at 826)), and dismissed the hair as irrelevant, arguing to the jury that it could have fallen innocently onto the body from the head of one of the police personnel or others who had handled or transported the body to the morgue. However, the State failed to disclose to the defense that, as reflected in the withheld contemporaneous notes prepared by Barbara Campbell of the State's Trace Evidence Department, the hair was not merely found "in the area of [the victim's] hand," but, rather, was found "*under [the victim's] bound hands.*" (Ex. 5 at OHP00000532 (emphasis added).) That undisclosed evidence would have rendered implausible the State's deliberately misleading attempt to undermine the significance of the hair found on the victim's body. The hair was not evidence the jury could or should have ignored; instead, it should have raised very serious questions with the jury regarding whether someone other than Mr. Apanovitch was in fact the actual perpetrator.

In addition, the State relied at trial on testimony from Ms. Campbell that body fluid found in the victim's vagina was from an "A-type" secretor, and evidence that Mr. Apanovitch is also an "A-type" secretor. By doing so, the State sought to physically link Mr. Apanovitch to the crime by establishing him as the source of the fluids found in Ms. Flynn's vagina, and thus her killer. (*See* Ex. 1 (Trial Tr.) at 734 (State Opening Statement) ("The evidence would show that the sperm within the body of Maryann Flynn was a Type A derivative. The evidence will show that Anthony Apanovitch's sperm is Type A derivative, which is characteristic in 40 percent of all human beings".))

That argument, it turned out, was knowingly baseless, and was also premised on blatant misconduct by the State. In fact, as the State knew, but failed to disclose to the defense at or before trial, Ms. Flynn herself was an "A" secretor, thus explaining the body fluids taken from her vagina. (*See* Ex. 5 at OHP00000532.) As Justice Brown later astutely observed in his dissenting opinion, because Ms. Flynn was an "A" secretor, recovery of a type A antigen from her body offers no information whatsoever concerning the blood type of the assailant. *Apanovitch*, 33 Ohio St. 3d at 30 (J. Brown dissenting) ("[i]f the victim was a secretor, the recovery of a type A antigen from the swab obtained from the victim (who was herself 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*") (emphasis in original).

The State knew that to be true, but instead manipulated the jury with knowingly false and incomplete information. Indeed, it was not until after Justice Brown's decision that the State and Ms. Campbell admitted the omission and amended the file to reference the fact that Ms. Flynn was a secretor. (*See* the revised Trace Evidence Report (Ex. 6 at CCME00000645) with the word "secretor" typed in after the fact.) That, of course, was too late for Mr. Apanovitch. The

jury was misled to believe that there was a physical connection between Mr. Apanovitch and Ms. Flynn, but, as it turned out, the truth was, and the State knew at the time, there was simply no legitimate basis for that argument, as Mr. Apanovitch's "A" secretor status was an evidentiary nullity.

The State also knowingly presented false testimony at trial from a police officer, Detective Zalar, regarding a distorted and inaccurate statement falsely attributed to Mr. Apanovitch. Detective Zalar testified to the jury that he received a call from Mr. Apanovitch, and that, during that call, Mr. Apanovitch allegedly asked for the opportunity to call his mother in advance "*when* I am indicted." (Ex. 1 (Trial Tr. (Det. Zalar) at 1507.) Detective Zalar testified that he found the statement to be "stunning," and the State characterized it as "extremely important," arguing that Mr. Apanovitch, by conceding that he was going to be indicted, had effectively admitted that he was guilty of the crime. (See Ex. 1 (Trial Tr. (State Closing)) at 2226 ("And, then, remember Officer Zalar's testimony? So extremely important. He says, 'Call me when they indict me.' He was stunned.").)

In truth, however, as reflected in the contemporaneous documentary record (again, withheld from the defense and flatly misrepresented by the State), Mr. Apanovitch's actual statement was entirely different. What Mr. Apanovitch *actually* said – which the jury never got to hear – was that during the call with Detective Zalar, Mr. Apanovitch "again stated that he was not responsible for this crime," and that "[h]e did request that *if* he was arrested or indicted in connection with this crime, that he be contacted first[.]" (Ex. 3 at OHP00006112 (emphasis added).) Significantly, Mr. Apanovitch's actual words – the truth – were never heard by the jury because of the State's misconduct. In fact, when the defense challenged Detective Zalar's testimony on cross-examination, the Court instructed the detective to review his notes to

determine whether there was any record of Mr. Apanovitch's alleged statement. Despite the fact that the police file contained a record of Detective Zalar's conversation with Mr. Apanovitch, and that record flatly contradicted the detective's trial testimony, the State represented to the Court, falsely, that a record of the conversation was "not in the report" prepared by Detective Zalar. (Ex. 1 (Trial Tr.) (Det. Zalar Cross) at 1507-09.)

It was not until state post-conviction proceedings that Mr. Apanovitch's defense team was able to secure a copy of the Cleveland Police Department's investigative file which contained the true and accurate record of Mr. Apanovitch's telephone conversation with Detective Zalar. Again, however, the truth came too late for Mr. Apanovitch. By then, he had already been convicted based, at least in part, on a false story that the State characterized as "stunning" and "extremely important," and, as argued to the jury, constituted an admission of guilt by Mr. Apanovitch.

Finally, other undisclosed evidence was inconsistent with, and at least arguably would have rebutted, the State's case at trial, including evidence of several other alternative perpetrators:

- Ms. Flynn occasionally gave her house keys to a pregnant woman who needed a place to stay, and that woman's boyfriend was known to use the basement window to get in and out of the house (Ex. 3 at OHP00006062, 6068 & 6070-6071);
- Ms. Flynn gave her house keys to an exterminator who had "worried her" (*id.* at OHP00006079);
- An individual walking in the area the day of the murder looked "confused," "bizarre," and "high on drugs" (*id.* at OHP00006075);
- Ms. Flynn and a friend ran personal ads in a local magazine, hosted "wine and cheese" parties at Ms. Flynn's home, and received "strange calls" as a result (*id.* at OHP00006071 & 6080);
- A former tenant of Ms. Flynn's was the victim of an attempted rape while living in Ms. Flynn's duplex (*id.* at OHP00006104);

- Neighbors told police that a local family, notorious for burglaries, was likely involved (*id.* at OHP00006069); and
- Although the State’s theory was that Mr. Apanovitch exited Ms. Flynn’s home through the basement window, the jury was never told that, on the night of Ms. Flynn’s murder, there was an attempted break-in through a basement window across the street from Ms. Flynn’s home (*id.* at OHP00006067-68).

In sum, the evidentiary record on which Mr. Apanovitch was convicted was fully discredited in the subsequent decades. As detailed above, several key pieces of evidence on which the State heavily relied have been rebutted as illusory, untrue or misrepresented, and have therefore effectively been erased from the record. Thus, the sole remaining facts are as follows:

- Undisputed DNA evidence that excludes Mr. Apanovitch as the source of semen found in Ms. Flynn’s vagina at autopsy;
- No physical evidence whatsoever linking Mr. Apanovitch to the crimes: no blood, no saliva, no hair, no sweat, no semen, no fingerprints, and no footprints. (Ex. 1 (Trial Tr. (Det. Simone) at 1064); Ex. 1 (Trial Tr. (B. Campbell) at 832));
- A hair found “under [the victim’s] bound hands” that does not belong to the victim or Mr. Apanovitch and, thus, at least arguably, must have come from the actual perpetrator. (Ex. 1 (Trial Tr. (B. Campbell) at 835); Ex. 5 at OHP00000532);
- Evidence of the several other, and arguably more likely, potential perpetrators described above;
- The scratch on Mr. Apanovitch’s face, considered in the context of the testimony of the medical examiner (Dr. Balraj) that (a) glass or a knife also could have caused the scratch; and (b) no bodily tissue was found beneath the victim’s fingernails. (Ex. 1 (Trial Tr. (Dr. Balraj) at 778 & 791);
- Mr. Apanovitch’s explanations of his whereabouts the night of the crime, which the State characterized as inconsistent, but which, based on a careful review of the record of Mr. Apanovitch’s interviews with the police, are actually largely consistent. *Compare* Interview #1 (Ex. 1 (Trial Tr. (Det. Adrine) at 1623-1627; *id.* (Det. Reese) at 1686-87) *with* Interview #2 (*id.* (Det. Zalar) at 1437-40; *id.* (Det. Bornfeld) at 1871-72) *with* Interview #3 (*id.* (Det. Adrine) at 1437-40; *id.* (Det. Bornfeld) at 1871-72) *with* Interview #4 (*id.* (Det. Simone) at 1142 & 1144-1145);

- The fact that Mr. Apanovitch was familiar with Ms. Flynn and her house, having been hired to paint a portion of the house; and
- The fact that Mr. Apanovitch may have expressed sexual interest in Ms. Flynn, and the fact that Ms. Flynn told a friend that she was fearful of an unnamed “painter.”

As discussed below, the trial court in this post-conviction proceeding viewed the exculpatory DNA evidence in the context of this factual record and rightly determined that no reasonable fact-finder could possibly conclude – much less beyond a reasonable doubt – that Mr. Apanovitch committed the crimes for which he was convicted.

B. In 2015, the Trial Court Granted Post-Conviction Relief to Mr. Apanovitch Following An Evidentiary Hearing On New DNA Evidence.

1. In 2008, the State disclosed that it had wrongfully withheld DNA testing from the Defense for nearly a decade.

In 1991, the Cuyahoga County Medical Examiner’s Office (“Coroner’s Office”) (then the Cuyahoga County Coroner’s Office) discovered three slides containing biological material taken from Ms. Flynn’s mouth and vagina during her autopsy in 1984, which the State previously asserted had been lost or destroyed. (Ex. 13; Ex. 43 at CCME00000699, 703.) In 2000 and 2001, the Coroner’s Office undertook DNA testing of those slides, as well as additional slides that had been stored in the State’s Pathology department. (Ex. 10 at CCME00000121-128, 132.) Despite active federal *habeas* litigation between the parties, the State failed to disclose to the defense that the Coroner’s Office had tested those two sets of slides, or the results of that testing.² Mr. Apanovitch did not discover the existence of that testing and those results until

² The State’s suggestion that Mr. Apanovitch sought to avoid DNA testing is unfair and incorrect. Mr. Apanovitch requested DNA testing in the first instance in 1989 but was informed that the autopsy slides had been lost or destroyed. When the State finally located the slides in 1991, it failed to notify Mr. Apanovitch for fourteen months, instead surreptitiously testing them without adequate controls or the appropriate oversight and involvement by Mr. Apanovitch’s defense team. When the State belatedly notified Mr. Apanovitch about the slides, he was (Continued...)

2008, and then only because that information was produced by the State during federal *habeas* proceedings. (See 3/21/12 Petition, Ex. 8 (12/2/08 Discovery transmittal letter from the Cuyahoga County Prosecutor).)

In 2007, Mr. Apanovitch was still litigating a variety of *Brady* claims in his federal *habeas* proceeding. Although these claims did not involve allegations concerning the newly-discovered DNA evidence, the district court ordered Mr. Apanovitch to provide a DNA sample and the State to conduct a comparison. The State produced a report allegedly from a forensic scientist at Forensic Science Associates (“FSA”), a laboratory in California, concluding that a partial profile consistent with Mr. Apanovitch’s DNA profile was found in one of the slides containing biological material from the victim’s mouth. Notably, the alleged author of the report never provided an affidavit or testimony concerning the authenticity of the report or the truth of its contents. And Mr. Apanovitch provided an expert report concluding that the State’s alleged report was unreliable, failed to document its methodology, and most importantly, that the sample upon which it was based did not appear to contain the victim’s DNA and thus could not have come from the victim. *Apanovitch v. Houk*, No. 1:91CV2221, 2009 WL 3378250, at *4 (N.D. Ohio Aug. 14, 2009), *aff’d sub nom. Apanovitch v. Bobby*, 648 F.3d 434 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1742 (2012).

understandably cautious due to the State’s inexplicable decision to conceal its discovery. Mr. Apanovitch was anxious to proceed with testing but declined, on the advice of counsel, to provide a sample of his own DNA until the State first satisfied its burden of proving a proper chain of custody. Mr. Apanovitch was later ordered to provide a DNA sample, and the chain of custody issue was the subject of an evidentiary hearing in the district court. As noted below, however, the district court never conducted any evidentiary hearing on the DNA evidence itself to determine whether the State’s secret testing was admissible, authentic, valid, or credible. Under the circumstances, and given the State’s history of misconduct and lack of transparency, Mr. Apanovitch’s decisions regarding DNA testing were eminently reasonable and prudent.

The district court deferred any assessment of the DNA evidence until after a chain of custody hearing regarding the DNA samples. *See, e.g., Apanovitch v. Tate*, No. 1:91-CV-2221, Doc# 135, slip op. at 1 (N.D. Ohio filed Oct. 8, 2008) (“[T]he parties are instructed to confer with one another 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 significance of the DNA testing, and issued a final decision on the *Brady* violations. *See Houk*, 2009 WL 3378250, at *4, **12-13.

During a subsequent appeal of the decision on the *Brady* claims, the Sixth Circuit expressly recognized that the DNA testing had not yet been “subjected to appropriate evidentiary challenges,” and that, in any event, it was not relevant to the resolution of Mr. Apanovitch’s claims in the federal *habeas* litigation. *Apanovitch v. Bobby*, 648 F.3d 434, 437-38 (6th Cir. 2011). Thus, critically, prior to this proceeding, no court had ever held any evidentiary hearing concerning the newly-disclosed DNA evidence.

2. **The trial court evaluated the testimony of DNA experts and properly found that new DNA testing conducted by the State excluded Mr. Apanovitch as the source of sperm from the victim’s vagina at autopsy.**

On March 21, 2012, Mr. Apanovitch filed a Petition for Post-Conviction Relief (the “Petition”) based on the newly-discovered DNA evidence. 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 which, the State and defense agreed on a joint set of hearing exhibits (which included the underlying trial transcript and many of the original exhibits presented at trial).

The trial court held the evidentiary hearing on October 14 and 15, 2014. At the evidentiary hearing, the court heard testimony from two experts: Dr. Rick Staub, for the defense,

and Dr. Elizabeth Benzinger, for the State. That testimony and the concomitant evidence established the following facts. At the time the newly-discovered DNA evidence was tested in 2000 and 2001, the Coroner's Office concluded that only one of the six slides tested, Item 1.2, yielded sufficient data from which relevant conclusions could be drawn. (Ex. 12 at CCME00000046-47.) At the October 2014 evidentiary hearing, Dr. Rick Staub (for the Petitioner) agreed with, and Dr. Elizabeth Benzinger (for the State) did not dispute, that conclusion. (PCR Tr. at 82-83 (Staub direct); 283 (Benzinger cross).) Significantly, both Dr. Staub and Dr. Benzinger also agreed that Mr. Apanovitch is *excluded* as the source of the DNA from Item 1.2, a slide that contains sperm taken from the victim's vagina at autopsy. (*Id.* at 276.) Dr. Staub further testified about the methodology used by the Coroner's Office to test the slide, and how he interpreted the results, explaining in detail his analysis and the conclusion (without caveat, qualification or reservation) that the data developed from testing Item 1.2 *excludes* Mr. Apanovitch as the source of sperm taken from the victim's vagina at autopsy. (*Id.* at 124; 129-152 (Staub direct).) Neither the State nor Dr. Benzinger disputed Dr. Staub's opinion.

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 Op. 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.* at 6), the trial court concluded that Mr. Apanovitch was entitled to acquittal on the charge of vaginal rape, and that the change in evidence required a new trial on the remaining charges. (*Id.* at 9.)

Having reached this conclusion, however, the trial court immediately encountered a clear constitutional issue. In 1984, the State failed to specifically charge Mr. Apanovitch with separate counts of oral and vaginal rape; instead, it had charged and convicted him of two counts of rape by “vaginal intercourse and/or fellatio.” (Trial Op. at 7-8.) The trial court was thus presented with an irremediable problem of the State’s own making. Nothing in the trial record indicated which of the two, identically-worded charges was intended to reflect the allegations of vaginal rape. Moreover, even if the trial court chose one of these counts at random, it would be a clear violation of the constitutional prohibition on double jeopardy to order a retrial on a count containing allegations of rape by vaginal intercourse – the identical crime for which Mr. Apanovitch had just been acquitted. *See, e.g. State v. Ogle*, 2007–Ohio–5066 at ¶ 15 (Ct. App. 8th Dist. 2007) (“to subject him to a retrial on the count after an acquittal on [] identical charges would violate his due process right against double jeopardy.”) Thus, the trial court concluded that the only constitutional result was to acquit on one and dismiss the other count of rape by “vaginal intercourse and/or fellatio.”

3. **The trial court thoroughly considered the entire trial record and applied the correct standard, in view of the new DNA evidence, to find that Mr. Apanovitch had proven actual innocence of vaginal rape, and thus was entitled to an acquittal on that count, dismissal of the remaining rape count, which included the same charge of vaginal rape, and a new trial on the murder charge.**

In the hearing below, the trial court heard testimony, questioned the witnesses, and carefully reviewed the entire record before reaching its decision. As noted in its opinion, it explicitly held that Mr. Apanovitch had satisfied his burden to prove the standard for relief under Ohio Rev. Code § 2953.21(A)(1)(a)&(b) by providing “clear and convincing” evidence that:

had the results of the DNA testing...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...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.”

See Ohio Rev. Code § 2953.21(A)(1)(b) (emphasis added).

As the trial court determined with respect to the vaginal rape charge, Mr. Apanovitch undeniably satisfied the applicable standard. The newly-discovered DNA evidence, based on testing generated by the State in 2000 and 2001, demonstrated as a matter of forensic certainty that Mr. Apanovitch was not the source of the semen taken from Ms. Flynn’s vagina during her autopsy. In other words, Mr. Apanovitch had to be excluded as the perpetrator of the vaginal rape of Ms. Flynn. The newly-discovered DNA evidence, thus, standing alone, was sufficient to satisfy the burden under Ohio Revised Code § 2953.21(A)(1), and further justified a new trial on the remaining charges under Rule 33 of the Ohio Rules of Criminal Procedure.

Of course, while the trial court’s decision was based on this new DNA evidence, the decision to grant a new trial on the remaining charges would be further justified by the numerous

factual developments of the past three decades. As explained above, the relevant non-DNA “evidence” on which Mr. Apanovitch was originally convicted has been disproven or rendered irrelevant in subsequent proceedings. No longer can there be any alleged physical connection between the victim and Mr. Apanovitch. Ms. Flynn was a Type-A secretor. (See Ex. 5 at OHP00000532.) Thus, the fact that the fluids found in her vagina were from a Type-A secretor told the court nothing about the identity of the assailant. Moreover, there is no longer any argument that Mr. Apanovitch implicated himself in the crime. Detective Zalar’s contemporaneous notes flatly contradict and thus fully rebut his trial testimony. (Ex. 3 at OHP00006112 (emphasis added).) And, the hair found “*under* [the] bound hands” of Ms. Flynn (Ex. 5 at OHP00000532 (emphasis added)) can no longer be disregarded as “irrelevant.” The location of the hair conclusively demonstrates that it must have been left by the actual killer. In other words, much of the evidence relied on by the State at trial, including its most powerful evidence implicating Mr. Apanovitch (a physical connection between Mr. Apanovitch and the victim and an inculpatory statement), has been washed away, and will no longer be part of the evidentiary record in any future trial.

Thus, a radically different narrative emerged in this proceeding. That narrative starts with the newly-discovered DNA evidence that excluded Mr. Apanovitch as the source of semen found in Ms. Flynn’s vagina at autopsy. That DNA evidence, of course, was consistent with the only other piece of physical evidence, a hair found under the victim’s bound hands that could not belong to the victim or Mr. Apanovitch and thus was most likely to have come from the actual perpetrator. The only physical evidence found at the scene (the hair and semen) conclusively, and irrefutably, did not belong to Mr. Apanovitch. Moreover, there was no physical evidence whatsoever linking Mr. Apanovitch to the crimes: no blood, no saliva, no hair, no sweat, no

semen, no fingerprints, and no footprints. (*See, e.g.,* Ex. 1 (Trial Tr.) at 825-26 (B. Campbell testimony).) Moreover, previously withheld reports from the Cleveland Police Department demonstrated that there was evidence at the time of trial of other, more likely, potential perpetrators, including neighbors, acquaintances of former tenants, and the individual(s) that were responsible for an attempted break-in through a basement window at Ms. Flynn’s neighbor’s house across the street *the very same night of her murder*.

Thus, the only “evidence” that remains in support of the State’s case is wholly circumstantial, unpersuasive, and irrelevant to the vaginal rape conviction:

- The scratch on Mr. Apanovitch’s face, considered in the context of the testimony of the medical examiner (Dr. Balraj) that: (a) glass or a knife also could have caused the scratch, and (b) no bodily tissue was found beneath the victim’s fingernails. (Ex. 1 (Trial Tr. (Dr. Balraj) at 778 & 791).)
- Mr. Apanovitch’s explanations of his whereabouts the night of the crime, which the State characterized as inconsistent, but which, based on a careful review of the record of Mr. Apanovitch’s interviews with the police, are actually largely consistent. *Compare* Interview #1 (Ex. 1 (Trial Tr. (Det. Adrine) at 1623-1627; *id.* (Det. Reese) at 1686-87) *with* Interview #2 (*id.* (Det. Zalar) at 1437-40; *id.* (Det. Bornfield) at 1871) *with* Interview #3 (*id.* (Det. Bornfield) at 1871) *with* Interview #4 (*id.* (Det. Simone) at 1142:18-25 & 1144:22-1145:3.) Indeed, Mr. Apanovitch consistently reported that he started the evening at Pinky’s bar. *Id.* He reported that he left Pinky’s bar for Comet Bar (just before the football game, or about 9:00 PM), and that minor variation was perhaps due to the start of the Thursday night preseason football game – which started at 7:00 PM instead of 9:00 PM like a typical Monday night football game at that time. In any event, the detectives all report that Mr. Apanovitch indicated that he returned to Pinky’s from the Comet bar (where he stayed until it closed), and then went to Brookside Inn (where he stayed until it closed), and then to Escape Lounge (where he stayed until it closed).

Viewed within this new factual matrix, the trial court correctly determined that the undisputed DNA evidence excluding Mr. Apanovitch as the source of the semen recovered from the victim’s vagina leads to only one conclusion – no reasonable fact finder would have found Mr. Apanovitch guilty of vaginal rape, and Mr. Apanovitch was entitled to a new trial on the remaining charges.

C. **The Trial Court Properly Declined to Consider Unsworn, Unauthenticated FSA Reports, Which the Prosecution Stipulated Would Not Be Introduced as Evidence or Relied upon in Connection with These Proceedings.**

The State's appeal from the decisions below is premised on a fiction. According to the State, the trial court refused to consider DNA "evidence" demonstrating that Mr. Apanovitch was the source of semen found in the victim's mouth. No such evidence exists. What the State is referring to are three documents that purport to be inculpatory expert reports by Dr. Blake of FSA. Critically, these purported reports have *never been authenticated by their alleged author* and have *never been sworn to or admitted into evidence in any court proceeding*.

These documents were once submitted by the State in connection with the federal *habeas* proceeding concerning Mr. Apanovitch's *Brady* claims. The documents were submitted to the federal district court without any affidavit concerning their authenticity or authorship, and they were never introduced as evidence through any evidentiary hearing. While the reports were discussed in *dicta* in a 2009 decision by the district court, the Sixth Circuit subsequently noted that the reports had never been "subjected to appropriate evidentiary challenges" and held that they were wholly irrelevant to resolution of Mr. Apanovitch's *Brady* claims. *Bobby*, 648 F.3d at 437-38.

Mr. Apanovitch expected that the State would seek to introduce the FSA reports into evidence, for the first time, in the course of this post-conviction proceeding. Accordingly, he sought discovery from their purported author, Dr. Blake. Dr. Blake refused to cooperate, however, and Mr. Apanovitch served a Deposition Subpoena on Dr. Blake and FSA in California. Opinion in *Ohio v. Apanovitch*, Nos. 102618 and 102698, slip op. at ¶ 22 (Ohio Ct. App. 8th Dist. filed May 5, 2016) ("Eighth District Op."). 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: (a) conduct a thorough and diligent search for documents responsive to the subpoena; and (b) appear for deposition on a mutually convenient date. Dr. Blake never provided any dates for his deposition. Accordingly, Mr. Apanovitch took steps to enforce the subpoena in California and compel Dr. Blake's response and appearance.

When Mr. Apanovitch advised the State of his intent, the State represented that it intended to file a motion to quash the subpoena served on Dr. Blake and FSA. Despite Apanovitch's counsel's repeated requests that the Prosecutor's Office do so promptly, no such motion was ever filed. Accordingly, on July 31, 2014, the State and counsel for Mr. Apanovitch had a telephonic hearing with the trial court to discuss Dr. Blake's refusal to appear for deposition. At that hearing, the State represented that it would not be relying on Dr. Blake as a witness at the evidentiary hearing. Based on the State's representation, the court concluded: "It's my position that Blake's out and I'm not going to allow him to testify." (7/31/14 Tr. at 37-38.) Counsel for Mr. Apanovitch followed up:

Mr. Cohen: Your Honor, ... I just want to get 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 Court: Can't get it in without him.

Mr. Cohen: Okay.

The Court: I don't know any evidence rule that would allow that, unless you stipulated to it.

(*Id.* at 39:3-15.) Leaving absolutely no room for doubt, the court issued an order the next day providing that, “Dr. Blake will not be presented as a witness by the prosecution and none of his reports of findings will be admitted.” (8/1/14 Order.)

The evidentiary hearing then proceeded with testimony from two experts, Dr. Staub and Dr. Benzinger. The undisputed testimony from both experts confirmed that Mr. Apanovitch was excluded from the vaginal rape of the victim and that there was insufficient material to reach any conclusion whether a profile consistent with his DNA profile was contained in the materials recovered from the victim’s mouth. Accordingly, the trial court acquitted Mr. Apanovitch of vaginal rape and ordered a retrial on the remaining charges in light of the unequivocally exculpatory DNA evidence. The court then ordered Mr. Apanovitch released on bond pending a new trial.

The State moved to reconsider the bond ruling, arguing that it was unreasonable in light of the unverified and unadmitted FSA testing that the State had stipulated would not be part of the proceedings. (2/13/15 State Motion on Bond.) At a February 17, 2015 hearing, the trial court took the State (specifically the lead Assistant Prosecuting Attorney Katie Mullin) to task for false public comments in the press and its brief opposing bond, including statements in which the State claimed that the FSA testing proved Mr. Apanovitch’s guilt. The court reminded 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.

* * *

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.

(2/17/15 Tr. 5-6; 7-8.) The trial 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 slides that the Coroner's Office had tested. (*Id.* at 10:14-13:18.)

In short, for reasons about which one can only speculate, Dr. Blake has never, in this proceeding or any other, testified to the authenticity of the alleged FSA reports or to the

truth/accuracy of their contents. And the State has actively sought to avoid any inquiry into their authorship or underlying methodology. This is the “evidence” at the heart of the State’s appeal. But it has never been admitted as “evidence” in any proceeding, was never made part of the record below, and was expressly disclaimed by the State in order to avoid any deposition of Dr. Blake regarding its authenticity or underlying methodology.

D. The Eighth District Unanimously Affirmed the Trial Court Decision.

Following the trial court’s decision, the State filed an appeal to the Court of Appeals for Ohio for the Eighth Appellate District (the “Court of Appeals”). The State’s appeal was premised primarily on an argument never presented to trial court below, that: (i) the veracity, accuracy, and substance of the FSA reports had been established as a matter of law through principles of *res judicata* by virtue of their having been discussed in *dicta* in the federal *habeas* litigation; and (ii) that, notwithstanding their stipulation and the trial court’s order that the FSA reports would not be introduced at the hearing, the trial court was somehow required to accept the conclusions of the unadmitted FSA reports – on which there was no testimony – as irrefutable fact and deny Mr. Apanovitch’s Petition.

On May 5, 2016, the Court of Appeals rejected this and every other argument put forth by the State and unanimously affirmed the trial court’s decision. First, the Court of Appeals held that it was entirely proper for the trial court to disregard the FSA reports, the findings of which were not binding in any respect. It further noted that:

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.

Eighth District Op. at ¶ 43.

The Court of Appeals then rejected the State’s argument that the trial court had improperly dismissed both rape claims based on a defective indictment claim, a claim the State argued could only have been brought at an earlier proceeding.

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 . . . [and] [t]he [jury] instructions referred to “vaginal intercourse and/or fellatio,” but did not distinguish which allegation of rape went with which count 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.”

Id. at ¶ 49.

The Court of Appeals held that this was the proper result to avoid double jeopardy concerns and that Mr. Apanovitch could not possibly have raised this issue in previous proceedings. It explained that “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.” *Id.* at ¶ 61.

Finally, the Court of Appeals rejected the State’s challenge to the trial court’s bond ruling. As the court explained, “[t]he trial court set Apanovitch’s bond after it had conducted a two day evidentiary hearing, had reviewed volumes of evidence, not only from the hearing, but also from past proceedings, and had reviewed the numerous prior cases relating to this matter.” *Id.* at ¶ 65. And as it further noted, the issuance of bond under these circumstances was consistent with prior decisions in the past. Accordingly, it held, the trial court did not abuse its discretion.

E. **This Court Denied the State’s Emergency Motion to Stay Mr. Apanovitch’s Release.**

On May 5, 2016, the State filed an emergency motion asking this Court to stay the release of Mr. Apanovitch on bond. That motion was premised entirely on the State’s argument that the trial court had failed to consider the unverified, unsworn, and unauthenticated FSA reports, which the State had stipulated would not be used in this proceeding, and the author of which the State actively sought to prevent from being deposed by Mr. Apanovitch. On May 11, 2016, this Court denied the State’s emergency motion. Mr. Apanovitch was subsequently released on bond and has since been living with family in Massilon, Ohio (Stark County), where his location is monitored by a GPS-enabled ankle bracelet. Mr. Apanovitch attends weekly meetings with his probation officer. There have been no reported violations of the terms of his bond.

III. **ARGUMENT FOR DENIAL OF THE PENDING APPLICATION FOR JURISDICTION**

A. **Appellee’s Response to the State’s Proposition of Law I: The District Court’s Statements about DNA Evidence at Best Constitute *Dicta* That Is Not Entitled to *Res Judicata* Treatment.**

The State concedes that it made the deliberate tactical decision not to introduce or otherwise rely upon Dr. Blake or the FSA reports in connection with the evidentiary hearing in the trial court. And the State does not dispute that it affirmatively sought to preclude Mr. Apanovitch from taking discovery and other appropriate steps to fully analyze, challenge, and rebut the FSA reports. Based on the State’s election (confirmed on the record and reduced to a written stipulation), Mr. Apanovitch forewent his opportunity to obtain discovery of FSA and Dr. Blake, and the trial court properly gave no consideration to the FSA reports.

After the evidentiary hearing, the State switched gears, arguing for the first time that the results of the FSA reports had already been established by so-called “factual findings” made by the district court in *habeas*, and that those “factual findings” and the “final judgment” on which

they supposedly were based were entitled to *res judicata* effect. Thus, the State argues, despite the fact that it agreed not to introduce the FSA reports into the record at the evidentiary hearing, the trial court should nevertheless have considered the so-called “DNA evidence” from the FSA reports based on the district court’s “factual findings,” and its failure to do so was reversible error. Based on that erroneous premise, the State now asks this Court to exercise jurisdiction to remedy a panoply of illusory transgressions and errors, including, *inter alia*, prohibiting state courts from ignoring the *res judicata* effect of factual findings made by federal courts with which they disagree.

As discussed below, however, the State has failed to identify a legitimate reason for this Court to exercise jurisdiction over this case, and each of the State’s arguments is based on a false and faulty premise. In fact, the district court made no “factual finding” and the Sixth Circuit issued no “final judgment” regarding DNA evidence that remotely implicates *res judicata*.

As a threshold matter, the State’s newly-adopted *res judicata* argument is inconsistent with the record, thus demonstrating that it was cobbled together by the State *after* the trial court issued its ruling. Indeed, the record is clear that the State expressly and affirmatively elected *not* to rely on the FSA reports for any purpose and never mentioned, let alone hinted, that it might seek to rely on the FSA reports through some backdoor *res judicata* argument. Nor can the State’s position now be reconciled with its ultimately successful attempts to preclude Mr. Apanovitch from taking the discovery of FSA and deposition of Dr. Blake, that were about to go forward at the time of the stipulation. Surely, if the State intended to rely on the FSA reports even indirectly, there would have been no reason for that discovery not to proceed. Indeed, at no time did the State contend or even suggest that discovery of Dr. Blake and the FSA reports would be unnecessary or inappropriate because the district court had already reached binding

“factual findings” about them. Rather, the State sought to block Mr. Apanovitch from taking that discovery based on the State’s affirmative representation that it did not intend to rely on Dr. Blake or FSA for any purpose, either directly or indirectly.

In any event, the State’s *res judicata* argument badly misstates the record and fails as a matter of law. Under Ohio law, *res judicata* applies only if the State can demonstrate that: (1) Mr. Apanovitch was “a party[] to the prior action; (2) there was a final judgment on the merits in the prior action; (3) the operative issue was necessary to the final judgment; and (4) the operative issue in the prior action is identical to the issue in the subsequent action.” *Powell v. Wal-Mart Stores, Inc.*, 2015-Ohio-2035, at ¶ 14 (Ct. App. 8th Dist.), *appeal not allowed*, 144 Ohio St. 3d 1427 (2015) (citations omitted). Specifically, *res judicata* acts to preclude only re-litigation “of an issue that had been ***actually and necessarily litigated and determined in a prior action***[.]” *State ex rel. Schachter v. Ohio Pub. Emps. Ret. Bd.*, 121 Ohio St. 3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, at ¶¶ 27-28 (2009) (emphasis added, internal citations and quotations omitted). As discussed below, however, other than the uncontroversial fact that Mr. Apanovitch was a party to the prior proceeding, the State cannot satisfy any of the remaining elements necessary to establish the application of *res judicata* to the district court’s decision.

1. **The admissibility, authenticity, and credibility of the DNA evidence have never been “actually and necessarily litigated.”**

The district court made no “factual finding” regarding the purported DNA evidence supposedly reflected in the FSA reports. To the contrary, it is undisputed that the FSA reports were never admitted into evidence in any evidentiary hearing and were never subject to any factual or evidentiary scrutiny. Neither Dr. Blake nor anyone else with personal knowledge has ever authenticated the reports or testified under oath as to the truth or accuracy of their contents. Neither Dr. Blake nor anyone else with personal knowledge has ever been subject to

cross-examination regarding the procedures or methodologies supposedly used in the testing or whether they comport with established scientific and forensic principles. The preparation and calibration of the equipment allegedly used to test the slides has never been disclosed or been subject to testing or evaluation. No log or laboratory notes from Dr. Blake or FSA – critical for any scientific testing – have ever been made available to explain and document the testing process. At bottom, the district court, with no discovery and no hearing, simply reviewed the unadmitted, untested, and unchallenged FSA reports and gratuitously summarized their contents without any analysis. That is, at most, *dicta*, but it most certainly is *not* a “factual finding” or “final judgment” that requires any consideration, let alone binding *res judicata* effect.

That the State’s claimed “factual findings” lack any binding effect is evident from the very decisions on which the State purports to rely. In remanding to the district court in 2006, the Sixth Circuit noted as follows:

Apanovitch continues to raise objections to the state’s request, arguing first that the test would be inaccurate and unreliable, and second, that the chain of custody is questionable. It is unclear to us whether any of the DNA material survived the testing, and the exact nature of the test results of the DNA evidence, as well as the chain of custody, remains murky. 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 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. Therefore, . . . we remand for that court’s further adjudication. In so doing, we note that the district court retains the inherent authority to conduct an evidentiary hearing with respect to the DNA evidence should it deem that course of action to be appropriate.

Apanovitch v. Houk, 466 F.3d 460, 489 (6th Cir. 2006).

In other words, the Sixth Circuit remanded to the district court with clear instructions to first address the threshold issue of whether consideration of DNA evidence would be relevant to Mr. Apanovitch’s claim that he had been prejudiced by the State’s *Brady* violations. According

to the Sixth Circuit’s instructions, if the district court determined that consideration of DNA evidence was warranted, and that a proper chain of custody could be established by the State, then, at that point, it was necessary for the DNA evidence to “be introduced and subjected to appropriate evidentiary challenges in court.” *Id.* Conducting that evidentiary hearing, the Sixth Circuit noted, would be in the district court’s “inherent authority.” *Id.*

The district court, however, ignored the Sixth Circuit’s instructions. Although the district court found the DNA evidence to be properly considered (erroneously, it turned out, *see Bobby*, 648 F.3d at 437), it skipped the critical and required next step identified in the Sixth Circuit’s instructions, failing to “conduct an evidentiary hearing” so that the DNA evidence could “be introduced and subjected to appropriate evidentiary challenges[.]” *Houk*, 466 F.3d at 489. The district court’s decision not to subject the DNA evidence to “appropriate evidentiary challenges” rendered its uninformed views about the evidence little more than irrelevant *dicta*. Stated differently, it is undisputed that neither the district court, nor for that matter *any* court, has *ever actually* or *necessarily* litigated and determined the authenticity, accuracy, or evidentiary value of the DNA evidence discussed in the FSA reports. Accordingly, under well-established Ohio law, *res judicata* is inapplicable.

2. Consideration of the DNA evidence and FSA reports was not necessary to the decisions of the district court or the Sixth Circuit.

Res judicata only applies where “the operative issue was necessary to the final judgment” in the prior proceeding. *Powell*, 2015-Ohio-2035, at ¶ 14. As this Court has explained, “where a determination in a prior federal action was not essential to the judgment obtained therein, collateral estoppel will not foreclose consideration of the issue in a subsequent state proceeding involving a different claim for relief.” *Kelly v. Georgia-Pac. Corp.*, 46 Ohio St. 3d 134, 138 (1989). Here, that critical prerequisite is absent for two independent reasons.

First, perhaps not surprisingly, the district court apparently recognized that the FSA reports were little more than hearsay, explicitly acknowledging that it was not necessary to rely on its view of the DNA evidence in order to reach its holding of the specific issue presented by the Sixth Circuit's remand, *i.e.*, whether Mr. Apanovitch was prejudiced by the State's myriad *Brady* violations. As the district court explained, "[t]he Court would deny Apanovitch's petition even without considering the DNA test results." *Houk*, 2009 WL 3378250, at **12-13. Because the district court was able to resolve the issue before it without resorting to consideration of the DNA evidence, as a matter of simple logic, the court's view of the evidence could not possibly have been "necessary to the final judgment." There is, therefore, no basis under Ohio law to afford the district court's irrelevant *dicta* any *res judicata* treatment.

Second, the Sixth Circuit recognized that the district court's reliance on the DNA evidence was improper. The Sixth Circuit took some responsibility for the district court's error, noting that the district court must have been confused by the Sixth Circuit's prior statement, in 2006, that the DNA evidence could be useful to resolve lingering doubts over Apanovitch's guilt "should it be introduced and subjected to appropriate evidentiary challenges in court." *Bobby*, 648 F.3d at 437. That statement, however, was only true, the court noted, if Apanovitch continued to assert a preservation-of-the-evidence claim based on the failure to preserve the serological evidence. As the court held, however, Mr. Apanovitch had not maintained that claim, and thus "the district court erroneously considered the DNA evidence as part of its prejudice analysis under *Brady*." *Id.* The Sixth Circuit thus pointedly held that the district court's discussion of and reliance on the DNA evidence was improper, holding that "the new DNA evidence is not relevant here and we therefore do not reach the chain-of-custody and interpretation-of-the-DNA-evidence issues." *Id.* at 438.

For that independent reason, the “chain-of-custody and interpretation-of-the-DNA evidence issues” were never reached by the Sixth Circuit, having been deemed by the court to be irrelevant and unnecessary to the resolution of the issues presented in the federal *habeas* litigation. Thus, issues relating to the chain-of-custody underlying the FSA reports and their potential significance as evidence were never “fully litigated” in the district court or the Sixth Circuit, and thus were not and could not possibly have been “essential to the judgment obtained therein.” *Kelly*, 46 Ohio St. 3d at 138. Accordingly, under Ohio law, the district court’s improper and irrelevant commentary about the DNA evidence – which was never subject to an evidentiary hearing, was never “introduced and subjected to appropriate evidentiary challenges in court,” and was rejected by the Sixth Circuit – is entitled to no *res judicata* treatment in this or any other proceeding.

3. **The district court’s decision was not a final judgment.**

Res judicata also does not apply because the district court’s decision was not a final judgment, and on appeal, the Sixth Circuit affirmed on alternative grounds. As a result, there was no final judgment addressing the admissibility, authenticity, and credibility of the FSA reports or the DNA evidence purportedly discussed therein. As a matter of law, that ruling divested the district court’s statements regarding the FSA reports of any arguable *res judicata* effect.

As the United States Supreme Court recently noted in *Jennings v. Stephens*, whenever an appellate court affirms “a judgment on an alternative ground . . . **issue preclusion no longer attaches to the ground on which the trial court decided the case, and instead attaches to the alternative ground on which the appellate court affirmed the judgment.**” 135 S. Ct. 793, 799 (2015), *cert. denied*, 136 S. Ct. 895 (2016) (emphasis added) (citing Restatement (Second)

of Judgments § 27 (1982));³ *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 428 (8th Cir. 2008)(holding that “basic principles of issue preclusion bar Fairbrook from relying on the district court’s alternative ruling that the Term Sheet was a Type I agreement because that ruling was not upheld on appeal”); *In re Baylis*, 217 F.3d 66, 71 (1st Cir. 2000)(“if the appellate court affirms on one ground and passes on the other, the judgment is conclusive only as to the first determination”)(internal citations, brackets, and punctuation omitted); *In re PCH Assocs.*, 949 F.2d 585, 593 (2d Cir. 1991)(“Both *res judicata* and issue preclusion” apply only to “a final judgment by the highest court to have considered the case”); Wright, Miller, Cooper, 18A Fed. Prac. & Proc. Juris. § 4432, at 63-64 (Finality—Traditional Requirement) (2d ed. 2002) (“If the appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved by the appellate court, whether it terminated the case on terms that left it unnecessary to resolve other matters or affirmed on some grounds and vacated or reversed on others.”).

Here, the Sixth Circuit held that “the district court erroneously considered the DNA evidence as part of its prejudice analysis under *Brady*” and instead affirmed the judgment on other grounds. *Bobby*, 648 F.3d at 437. Accordingly, the district court’s commentary about the FSA Reports was rendered a legal nullity, and the State’s attempt to elevate it into *res judicata* fails as a matter of law.

³ This Court has likewise repeatedly looked to the Restatement of the Law 2d, Judgments, Section 27 as a controlling authority for determining the collateral estoppel effect of a prior judgment. *See, e.g. State ex rel. Davis v. Pub. Emps. Ret. Bd.*, 120 Ohio St. 3d 386, 2008-Ohio-6254, 899 N.E.2d 975, at ¶ 30 (2008) (requirement for “the application of collateral estoppel is explained in 1 Restatement of the Law 2d, Judgments (1982) 256–257, Section 27”); *Kelly*, 46 Ohio St. 3d at 138 (applying “Comment *j* to Section 27 of 1 Restatement of the Law 2d, Judgments (1982) 260-261”); *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 203, 443 N.E.2d 978, 987 (1983) (applying the standards “as set forth in Restatement of Judgments 2d, Section 27”).

4. **The issue in the prior action was not identical to the issue before the trial court.**

Finally, *res judicata* does not apply because “the operative issue in the prior action” was not “identical to the issue in the subsequent action.” *Powell v. Wal-Mart Stores, Inc.*, 2015-Ohio-2035, ¶ 14 (8th Dist. 2015); *see also Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St. 3d 193, 201, 443 N.E.2d 978, 985 (1983)(in order to establish collateral estoppel effect, the party “asserting the preclusion must prove that the *identical issue* was actually litigated”)(emphasis added).

The issue before the trial court was whether Mr. Apanovitch was able to meet his burden of proving actual innocence under R.C. 2953.21 based on newly-discovered DNA evidence. Mr. Apanovitch met that burden, the trial court found, on the basis of DNA evidence establishing that Mr. Apanovitch was excluded as the source of the semen found in the victim’s vagina, thus leading to the acquittal of the conviction of vaginal rape. The issue before the district court in the *habeas* proceeding was far from identical and, indeed, was materially different. There, the issue was whether the State’s several *Brady* violations were sufficiently prejudicial under federal precedent to grant *habeas* relief. Although ultimately not relied on by the district court or the Sixth Circuit, the purported DNA evidence that was the subject of the chain-of-custody hearing involved different slides that were not at issue in the evidentiary hearing before the trial court. To be clear, the purported testing referenced in *dicta* by the district court was unauthenticated hearsay by a third party, not the State, and did not involve the testing at issue before the trial court on Mr. Apanovitch’s post-conviction petition.

It bears repeating that the trial court here found ***after a full evidentiary hearing*** that Mr. Apanovitch was excluded as the source of the semen found in the victim’s vagina, whereas it is undisputed that the testing of the semen at issue in the *habeas* proceeding was ***never the subject***

of an evidentiary hearing which, as the Sixth Circuit noted, would be required to ensure that it would be introduced and subjected to appropriate evidentiary challenges in court. For those reasons, the issue in the prior action was materially different than the issue before the trial court, and, accordingly, under Ohio law, *res judicata* is inapplicable.

* * *

In sum, the State’s argument that the district court’s comments regarding the FSA reports and DNA evidence warrant *res judicata* treatment is factually and legally bankrupt. There was no “factual finding” or “final judgment,” and the trial court and the Court of Appeal was under no obligation to give binding consideration to the district court’s *dicta*. Under the circumstances, the State has identified no constitutional issue or question of public or great general interest that warrant this Court to exercise jurisdiction over this case.

B. Appellee’s Response to State’s Proposition of Law II: There Is No Reasonable Question That DNA Testing on Sperm Samples Taken from the Vagina at Autopsy Excluded Mr. Apanovitch as the Source and Required Acquittal Because Those Samples Were the Sole Basis for the Vaginal Rape Conviction at Trial.

In 1984, Mr. Apanovitch was charged with vaginal rape based solely on testimony from Barbara Campbell (of the Cuyahoga County Coroner’s Office), who “found sperm . . . in the [victim’s] vagina,” and thus concluded that the assailant had non-consensual “vaginal intercourse” with the victim. (Ex. 1 (Trial Tr.) at 805-06.) Three decades later, DNA testing has unequivocally established that Mr. Apanovitch is not the source of sperm found in the victim’s vagina. In response to this exonerating evidence, the State raises a host of indefensible arguments as to why Mr. Apanovitch’s conviction for vaginal rape should stand in the face of unequivocal DNA evidence precluding his guilt as a matter of forensic certainty. The State’s position is wrong as a matter of law and defies common sense.

At the outset, the State asserts that Mr. Apanovitch could not establish his actual innocence of the vaginal rape charge “without first establishing an evidentiary link between that DNA and the murder.” (State Br. at 21.) There is no authority for the proposition advanced by the State. To the contrary, under the statute, all Mr. Apanovitch needed to establish was that the newly-discovered evidence, considered in the context of all the other evidence in the case, proved his actual innocence of the specific offense – vaginal rape – for which he was determined to be actually innocent. Mr. Apanovitch met that burden.

Next, emphasizing that DNA testing revealed sperm from two to three unidentified males, the State argues (without any citation to the record or expert testimony) that this should be deemed evidence of contamination rather than exoneration. But whether or not the presence of two or three unknown male profiles is the result of contamination, or belongs to the actual perpetrators, is irrelevant. All that mattered for purposes of the evidentiary hearing in the trial court was that Mr. Apanovitch, as a matter forensic certainty, was *not* the source of the sperm found in the victim’s vagina, which the State relied on to convict Mr. Apanovitch of rape at trial. That was sufficient to meet Mr. Apanovitch’s burden for this specific conviction.⁴

⁴ The State misleadingly cites to an inapposite decision for the proposition that “where a DNA test reveals multiple unknown male profiles, ‘for that to have occurred, there had to have been either contamination or transfer.’” *State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072, at ¶ 118 (Ct. App. 9th Dist.), *appeal not allowed*, 139 Ohio St. 3d 1483 (2014). In *Prade*, the victim’s ex-husband was convicted of her murder based on the testimony of 53 witnesses, including two eyewitnesses who placed the defendant at the scene of the crime near the time of the murder. *Id.* at ¶¶ 117, 120. The Court rightly held that inconclusive DNA evidence from the victim’s lab coat was insufficient to find the defendant actually innocent of murder, particularly because there was a forensic reason to believe that the DNA was not left by the murderer. The outcome in *Prade* has no bearing here. Mr. Apanovitch was not found actually innocent of murder based on the DNA evidence. Instead, he was found to be actually innocent of vaginal rape, a crime **for which the only evidence was the sperm taken from the victim**. The State’s allusion to circumstantial evidence purportedly supporting the murder charge does not support, in any way, a charge of vaginal rape.

Equally meritless are the State's arguments that the DNA results should be disregarded because "DNA in the vaginal slide could have been as much as five days old at the time of the murder." (State Br. at 23.) That newly and belatedly concocted argument is patently inconsistent with the evidence and arguments introduced at Mr. Apanovitch's trial. There, the State obtained a conviction based on the successful argument that the semen in the victim's vagina resulted from forceable rape by Mr. Apanovitch. The State offered direct testimony from Ms. Campbell that she "found sperm . . . in the [victim's] vagina," and thus concluded that the assailant had non-consensual "vaginal intercourse" with the victim. (Ex. 1 (Trial Tr.) at 805-06.) And in its closing, the State explicitly argued that "[t]hey found that the sperm that was in her mouth and **her vagina, which was clearly from recent intercourse**, was that from someone who had A positive blood and is a secretor," and that that person was the murderer. (Ex. 1 (Trial Tr.) at 2193 (emphasis added).) In other words, the State itself established the link between the crime and the sperm found in the victim's vagina. The State cannot now cavalierly abandon the very assertions and evidence on which it prevailed at trial to attempt to avoid acquittal of that charge on a post-conviction petition. Indeed, if the State is correct, and the semen in the victim's vagina was the result of consensual sex⁵ prior to the murder, all that would mean is that there was no rape. If that was the case, the acquittal of Mr. Apanovitch on the rape charge would in any event have been proper, indeed required, as a matter of law.

Next, the State's suggestions that Mr. Apanovitch did not contest the evidence submitted to the jury, or that the Court of Appeals focused entirely on the DNA evidence and "blinded

⁵ The record lacks any evidence as to the cause of the semen in the vagina at autopsy other than the rape the State argued at trial was the explanation, and the State's expert, Dr. Benzinger, admitted in the hearing below that she had no information about consensual sex partners or facts that would support such an explanation for the semen present at autopsy. (10/15/14 Tr. at 48).

itself” to the trial evidence, is patently false. As a threshold matter, the relevant evidentiary record changed materially as a result of post-conviction litigation which revealed (as the Court of Appeals held) that key pieces of evidence were withheld or misrepresented by the State as a result of grossly improper conduct by the State. *See* Eighth Circuit Op. at ¶ 11 (“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”); *id.* at ¶ 15 (“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 ¶ 16 (“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”).

At the evidentiary hearing, Mr. Apanovitch addressed those critical pieces of evidence and otherwise challenged the sufficiency of the much diminished and entirely circumstantial evidence. The trial court and the Court of Appeals took into consideration all of the relevant evidence and determined that, in light of the DNA evidence and the materially different evidentiary record resulting from the elimination of evidence improperly submitted or misrepresented to the jury by the State, a retrial on the remaining charges was in order. That decision was prudent, warranted, and well within the court’s discretion.

Finally, the State’s argument that the court failed to consider the semen in the victim’s mouth is just a different iteration of its baseless *res judicata* argument. As explained above, that argument is without merit, as the FSA reports and DNA testing were never admitted into evidence, authenticated, or subjected to evidentiary or scientific scrutiny, and as the State affirmatively elected not to rely on them for any purpose in connection with the evidentiary hearing. Moreover, the State does not explain how this report, even if it could possibly be

considered as evidence (and it cannot), would support a charge of *vaginal* rape. The State has missed the fundamental issue here; the sole evidence in support of Mr. Apanovitch's conviction for vaginal rape has now been eliminated from the case because he has been excluded as its source. As the lower courts correctly determined, there is no longer any basis to support that conviction and acquittal is required as a matter of law.

C. **Appellee's Response to State's Proposition of Law III: There Was No Issue of Defective Indictment Raised below or Potentially before This Court; Instead, the Court of Appeals Applied Basic Principles of Double Jeopardy after Mr. Apanovitch Was Excluded as the Source of Sperm in the Vagina of the Victim.**

Unable to address the double jeopardy issues identified by both courts below, the State misrepresents the lower courts as having improperly decided a "defective indictment claim" under *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005). The State's argument is a red herring. Neither of the lower courts applied *Valentine* as controlling authority, and neither issued any decision based on the indictment having been defective at the time of trial. Defective indictment claims allege that a defendant was prevented from defending himself at trial because the indictment failed to give adequate notice of what was being alleged. Mr. Apanovitch has never claimed, and neither court below found, that his original trial was tainted by defects in his indictment. Here, the potential constitutional violation was not inherent in the indictment itself, but instead arose only after the trial court reached its decision to acquit Mr. Apanovitch of vaginal rape. In other words, the concerns over double jeopardy did not arise until now, and thus could not possibly have been raised by Mr. Apanovitch at his trial three decades ago.

Both the trial court and the appellate court made the non-controversial conclusion that the State's sloppy use of carbon copy counts in 1984 created the potential for a future double jeopardy concern, but this issue only arose after Mr. Apanovitch was unequivocally excluded as the source of semen found in the victim's vagina. As the trial court noted, Mr. Apanovitch was

convicted of two carbon copy counts of rape by “vaginal intercourse and/or fellatio,” and there was nothing in the record to “distinguish in any way between the two separate counts of rape.” (Trial Op. at 7.) Thus, the trial court held, “[h]aving the current evidence excluding the Petitioner from the vaginal rape[,]” it is impossible to determine “which count or counts of rape are to be dismissed, count 3 and/or count 4[.]” (*Id.* at 8.) The trial court was thus presented with an irremediable constitutional problem of the State’s own making. Even if the court chose to dismiss one of these counts at random, it would constitute a clear violation of the constitutional prohibition on double jeopardy to order a retrial on a count containing allegations of rape by vaginal intercourse – the identical crime for which Mr. Apanovitch had just been acquitted. Thus, the trial court correctly reached the only constitutional decision; it acquitted one and dismissed the other count of rape by “vaginal intercourse and/or fellatio.”

Ohio courts frequently act to protect defendants from double jeopardy concerns arising from the use of carbon copy indictments. *See, e.g., State v. Ogle*, 2007-Ohio-5066, at ¶ 23 (Ct. App. 8th Dist. 2007) (“Retrial upon the mistried rape count, therefore, would constitute double jeopardy.”); *State v. Jackson*, 2011-Ohio-5920, at ¶¶ 47-48 (Ct. App. 8th Dist. 2011) (carbon copy counts deemed unconstitutional where they failed “to protect [defendant] from double jeopardy”); *State v. Holder*, 2008-Ohio-1271, at ¶ 11 (Ct. App. 8th Dist. 2008) (granting motion to dismiss where defendant was charged with “five carbon copy rape counts” and prosecution failed “to differentiate these counts from one another ‘such that a court in a second trial would be able to discern whether there had been a previous finding of not guilty as to the alleged act.’”) (citation omitted).

And there is nothing novel about recognizing that, while an indictment based on carbon copy counts may not violate the constitution at the time of trial, it plants the seed for double

jeopardy concerns in the event of future appeals. In this respect, the Eighth District’s decision in *Ogle* is directly on point. There, the defendant was indicted on, among other charges, “three identically-worded counts of rape,” intended to encompass two instances of “digital[] rape” and one instance of oral rape. *Ogle*, 2007-Ohio-5066, at ¶¶ 2, 10. At the conclusion of testimony, the jury informed the judge that it was deadlocked on one of the three counts of rape. The court then proceeded to accept the jury’s verdict of not-guilty on two counts of rape while ordering a mistrial on the third, deadlocked count. In a post-trial proceeding, the defendant moved to dismiss the remaining carbon copy rape count on double jeopardy grounds, and the court denied his motion. On appeal, the Court reversed, summarizing the issue as follows:

[A]ppellant contends that the trial court erred in denying his motion to dismiss count 17, the mistried rape count, because to subject him to a retrial on the count after an acquittal on two identical charges would violate his due process right against double jeopardy. We agree.

Id. at ¶ 15. As explained by the court, “[i]t 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.” *Id.* at ¶¶ 17, 19.

In its cursory analysis of this issue, the State avoids tackling the clear double jeopardy violation that would result from ordering a retrial of Mr. Apanovitch on a single carbon copy count of rape by “vaginal intercourse and/or fellatio.” According to the State, it is “obvious . . . that one count of rape referred to the vaginal rape and one count referred to the oral rape.” (State Br. at 35.) ***But the State does not even allege, much less establish from the record, which of its indistinguishable rape charges was intended to address vaginal rape, and which was intended to address oral rape.*** In the absence of such a distinction, the State would have the trial court engage in a legal fiction, dismissing one of the two counts at random and ordering a new trial on

a count that, on its face, alleges conduct identical to that for which Mr. Apanovitch has now been acquitted. Such a decision would violate the very essence of the prohibition on double jeopardy.

Finally, the State continues to complain that the trial court reached its decision without giving the State an opportunity to submit briefing on the double jeopardy issue. First, the State inexplicably claims that it was entitled to submit briefing on this issue as a matter of “due process.” The Eighth District recently rejected an identical argument from the Cuyahoga County Prosecutor’s Office because, as a political subdivision of the state, it is not entitled to claim protection under the due process clause:

In *Avon Lake City School Dist. v. Limbach*, 35 Ohio St. 3d 118, 121, 518 N.E.2d 1190 (1988), the Ohio Supreme Court stated: “[A] political subdivision may not invoke the protection provided by the Constitution against its own state A political subdivision receives no protection from the [D]ue Process Clauses vis-a-vis its creating state. Relying on the Ohio Supreme Court’s rationale in *Avon Lake*, this court, and other courts in this state, have reasoned that “the state is the entity which must *provide* due process; it has no right of due process from itself. Therefore, it cannot claim a constitutional right to notice.” . . . **The Cuyahoga County prosecutor’s office, as a county office, is by definition a political subdivision. Thus, the prosecutor’s office is not entitled to invoke the protections of due process because, as a division of the state, it has no standing to assert a due process violation against itself.**

State v. Wheeler, 2015-Ohio-3231, at ¶¶ 25-27 (Ct. App. 8th Dist. 2015), *appeal allowed*, 144 Ohio St. 3d 1458, 2016-Ohio-172, 44 N.E. 3d 287 (2016) (reversed on other grounds).

Second, the State misrepresents this Court’s decision in *State v. Tate* as standing for the proposition that “lower courts” are prohibited from deciding “cases on the basis of a new, unbriefed issue without ‘giv[ing] the parties notice of its intention and an opportunity to brief the issued.’” (State’s Br. at 33.) The Court in *Tate* actually held that “*appellate courts* should not decide cases on the basis of a new, unbriefed issue”; the Court did not in any way negate the broad authority granted to trial courts to *sua sponte* resolve issues presented at trial, whether

raised by the parties or not. *State v. Tate*, 140 Ohio St. 3d 442, 2014-Ohio-3667, 19 N.E.3d 888, at ¶ 21 (2014), *appeal not allowed*, 143 Ohio St. 3d 1404 (2015) (emphasis added).

In any event, even in the appellate context, this Court has clearly stated that an “appellate court may consider *sua sponte*... whether a potential remand would inevitably violate a defendant’s double-jeopardy rights.” *State v. Broughton*, 62 Ohio St. 3d 253, 262 n.8 (1991); *see also Akron v. Jaramillo*, 97 Ohio App. 3d 51, 55 (Ct. App. 9th Dist. 1994) (“Our disposition of this case raises the issue of whether a second trial . . . would violate his double jeopardy rights. If it would, then this court will dismiss this appeal, since it would be plain error to remand the matter to the trial court . . . Although neither party has briefed this issue, this court is compelled to address it”); *State v. Shinn*, No. 99CA29, 2000 WL 781106, at *5 n.2 (Ohio Ct. App. 4th Dist. June 14, 2000) (observing that appellate courts are permitted to “*sua sponte* raise[] the issue of a potential double-jeopardy bar on the basis that it would be plain error to remand a matter that is otherwise barred by double-jeopardy principles”). Thus, the State’s argument is contradicted by binding precedent from this Court.

In sum, nothing in the trial record indicated which of the two, identically worded charges was intended to reflect the allegations of vaginal rape. And both counts include allegations of vaginal rape, the precise crime for which Mr. Apanovitch has now been found actually innocent. Thus, even if the Constitution would permit the trial court to engage in a legal fiction, choosing to dismiss one of these counts at random, the court could not constitutionally order a retrial on a count alleging conduct for which Mr. Apanovitch had just been acquitted. As the Eighth District concluded in *Ogle*: “to subject him to a retrial on the count after an acquittal on [] identical charges would violate his due process right against double jeopardy.” 2007-Ohio-5066, at ¶ 15.

D. **Appellee's Response to State's Proposition of Law IV: Where Mr. Apanovitch Was Excluded as the Source of the Sperm in the Victim's Vagina at Autopsy, Basic Concepts of Double Jeopardy Bar Re-trial for the Same Act of Vaginal Rape.**

The State's fourth proposition of law is largely duplicative of its third proposition and fails for identical reasons. Here, the State continues to argue – incorrectly – that the lower courts granted relief based on a defective indictment claim under *Valentine*. Again, neither lower court applied *Valentine* as controlling law and both lower courts reached a decision based on double jeopardy grounds. As noted above, both the trial court and the appellate court made the non-controversial conclusion that: (i) the State's sloppy use of carbon copy counts in 1984 created the potential for a future double jeopardy concern; and (ii) that concern came to fruition as a result of Mr. Apanovitch being unequivocally excluded as the source of semen found in the victim's vagina.

In an effort to avoid this irrefutable truth, the State attempts to argue that a re-trial on carbon copy counts is not a problem because, unlike in other carbon copy cases, (i) “the trial court in this case issued a written opinion stating that it was acquitting Apanovitch of the vaginal rape only”; and (ii) “there [is] thus no possibility that he would face a second prosecution for that offense.” (State Br. at 37.) But again, the State ignores an irremediable obstacle arising from its own sloppy indictment practices. In this case, it is not simply that the indictment said too little to identify the conduct underlying each count. In addition, it said too much. Each count was overbroad, specifically alleging two different types of conduct: rape by “vaginal intercourse and/or fellatio.” Thus, it is not simply that the counts are identical. In addition, retrying Mr. Apanovitch on one of these counts would require that he be indicted for a charge that explicitly alleges conduct for which he has been found actually innocent. There could be no clearer violation of double jeopardy. The State's assertion that there is “no possibility that [Mr.

Apanovitch] would face a second prosecution for [rape by vaginal intercourse]” clearly fails in light of the State’s request that a retrial be issued on a single count of “vaginal intercourse and/or fellatio.”

Finally, the State’s suggestion that the lower court’s rulings somehow open the floodgates to invalidating hundreds or thousands of convictions is baseless. The holding of this case is fact-specific and addresses only those instances where: (i) the State charges a defendant with carbon copy counts that simultaneously allege two different types of conduct; (ii) the defendant is convicted on all counts; and (iii) the defendant subsequently obtains post-conviction relief requiring dismissal of one of these overbroad carbon copy counts. The State has not identified a single conviction in all of Ohio falling into this distinctive category. Its argument has no merit.

E. **Appellee’s Response to Amicus Curiae’s Proposition of Law 1: Mr. Apanovitch Bore the Burden of Proof and Carried That Burden. There Was No Improper Burden Shifting Below. This Issue Was Not Raised below, and Should Be Deemed Waived.**

In its *Amicus* Brief, the Ohio State Attorney General’s Office (the “*Amicus*”) makes the unsupported argument that the trial court somehow shifted the burden away from Mr. Apanovitch and to the State in the proceeding below. At the outset, this meritless argument was never raised by the State below, and an *Amicus* Brief cannot be utilized as a backdoor method for raising new arguments on appeal. *See Hack v. Gillespie*, 74 Ohio St. 3d 362, 367 n.5, 658 N.E.2d 1046, 1050 n.5, 1996-Ohio-167 n.5 (1996) (“[A]micus Ohio Academy of Trial Lawyers also raise[s] a number of constitutional challenges to Ohio’s Fireman’s Rule. However, these issues were not raised in the trial court and, accordingly, have been waived”). But even if considered on its merits, this argument defies both the record and common sense. The trial court properly summarized the burden in this case, observing that:

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 the 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

(Trial Op. at 5.)

The trial court continued to hold that Mr. Apanovitch met this burden, noting that he provided testimony from Dr. Staub who, having been “asked his opinion whether the results of the DNA testing of the vaginal slide materials excluded Petitioner,” testified that it “was his unequivocal opinion that the Petitioner was specifically excluded.” (*Id* at 6.) Noting that Dr. Staub’s testimony was “uncontroverted,” the court concluded that Mr. Apanovitch submitted “evidence [that] [met], and exceed[ed], the standard of clear and convincing evidence of actual innocence as far as the vaginal rape.” (*Id.*)

In its first point of law, the *Amicus* seeks to manufacture a burden-shifting error that appears nowhere on the record. This argument is based on a blatant misrepresentation of what constitutes the record in a post-conviction relief proceeding, as well as on legally meritless assertions concerning the consequence of the reference to the FSA reports in dicta in the federal *habeas* proceedings. As discussed in section III.A, *supra*, the federal *habeas* proceedings did not result in any factual findings concerning the FSA reports, and the courts’ discussions, in dicta, did not constitute evidence or bind the trial court in any way.

Moreover, the State explicitly stipulated that it would not introduce or rely on the FSA reports in this proceeding. Absent their introduction at the evidentiary hearing, the FSA reports could not possibly constitute *evidence* in the record. Under Ohio law, a trial court in a post-conviction proceeding cannot consider evidence that was “neither filed in the original [criminal]

action nor [] admitted into evidence in the course of the [post-conviction] evidentiary hearing.” *State v. Harder*, No. 9-83-26, 1984 WL 8092, at **1-2 (Ohio Ct. App. 3d Dist. Oct. 9, 1984); *State v. Winston*, No. C.A. L-80-223, 1981 WL 5645, at *3 (Ohio Ct. App. 6th Dist. June 12, 1981) (“The voir dire was not admitted into evidence at the post-conviction hearing. The use of such extraneous material . . . constitute a denial of defendant-appellant’s right to confrontation, cross-examination, and an impartial tribunal”) (citations omitted); *State v. Chapman*, No. CA94-04-004, 1994 WL 650065, at *2 (Ohio Ct. App. 12th Dist. Nov. 21, 1994) (it is error for the court to rely on “[d]ocuments and testimony not of record in the original criminal case and not placed in evidence in postconviction proceedings”); *State v. Lloyd*, 8 Ohio App. 2d 155, 157 (4th Dist. 1966) (“Since it is not an original document in the record of the criminal action” and “was not offered or accepted into evidence in the post-conviction action, it was not before the court as evidence. It obviously cannot be added to the record on appeal.”). The *Amicus*’s argument is thus premised on exactly what Ohio law forbids.

Straining to avoid these governing legal principles, the *Amicus* argues that the FSA reports should have been considered as substantive evidence because “the results were outlined in two federal court opinions” and “Apanovitch himself submitted those reports as evidence attached to his post-conviction petition.” (*Amicus* Br. at 9.) But passing references to the FSA reports in a court’s decision in a separate proceeding are insufficient to render the contents of the FSA reports a part of the record in this proceeding. As an initial matter, and as discussed above, no court has ever considered or ruled upon the authenticity, much less the accuracy, of the FSA reports or the reliability of any findings contained therein. Indeed, the Sixth Circuit decision relied upon by the State simply concluded that if, in the future, the FSA reports “should [] be introduced and subjected to appropriate evidentiary challenges in court, [they] might help resolve

lingering questions of whether... Apanovitch's innocence claim can be verified." *Houk*, 466 F.3d at 489. But this process has never taken place, and while the *Amicus* is correct that a federal court had already determined that the FSA reports *would be* relevant evidence in any litigation over actual innocence, this does not override the requirement that FSA reports actually be admitted as evidence to become part of the record in this proceeding.

Moreover, Ohio courts have repeatedly confirmed that documents from appellate proceedings do not constitute part of the record in a R.C. 2953.21 post-conviction proceeding. In *State v. Woodard*, the appellant challenged the denial of his petition for post-conviction relief on the grounds that the trial court "erroneously dismissed his petition without reviewing the entire record" by failing to consider various pleadings contained in the petitioner's separate appeals from his original conviction. No. 71912, 1998 WL 23844, at *6 (Ohio Ct. App. 8th Dist. Jan. 22, 1998). In denying his appeal, this Court held:

We reject his argument that the court's duty to review "all the files and records pertaining to the proceedings against the petitioner" requires the court to review the pleadings from Mr. Woodard's direct appeals to the Court of Appeals and to the Supreme Court. Clearly the appeals were not "proceedings against the petitioner." In *State v. Lloyd* (1966), 8 Ohio App. 2d 155, 156, the court held that the "files and records" referred to in R.C. 2953.21 are those of the original criminal action which is being challenged by the motion to vacate.

Id.; see also *State v. Greer*, No. 15217, 1992 WL 316350, at **7-8 (Ohio Ct. App. 8th Dist. Oct. 28, 1992) ("R.C. 2953.21 refers to the materials comprising the record in a post-conviction relief proceeding . . . While recognizing that this list is not all inclusive, the focus is on matters related to the trial and sentencing of the defendant, and not the appellate proceedings"); 53 Ohio Jur. 3d Habeas Corpus § 115 ("The files and records to be considered are those of the original criminal action being attacked by the petition"). This prohibition is all the more relevant here, given that the State asks the Court to consider extra-record materials from federal *habeas* proceedings—a matter that is not even part of Ohio appellate proceedings.

Moreover, even if the trial court were permitted to consider documents outside of the relevant record, the rules of evidence would preclude it from considering the unsworn, unauthenticated FSA reports. In the context of a post-conviction proceeding, the trial court is constrained by the rules of evidence (and due process), including the requirement that documents be authenticated by a proponent with personal knowledge, the prohibition on hearsay, and the requirement that testimony be provided under oath. *See State v. Taborn*, No. 77650, 2000 WL 1739299, at *4 (Ohio Ct. App. 8th Dist. Nov. 22, 2000) (rejecting unauthenticated documents and noting that “[e]ven had these documents been authenticated, they would not be sufficient because they are absolutely hearsay”).

First, neither the State nor the *Amicus* even attempt to address the fact that the FSA reports are unsworn, and are thus inadmissible as a matter of law. Ohio courts repeatedly hold that “[d]ocuments that have not been sworn, certified, or authenticated by way of affidavit ‘have no evidentiary value.’” *Moreland v. Ksiazek*, 2004-Ohio-2974, at ¶ 25 (Ct. App. 8th Dist. 2004) (trial court properly rejected unsworn expert letter) (*citing Mitchell v. Ross*, 14 Ohio App. 3d 75, 75 (Ct. App. 8th Dist. 1984)); *McIntyre v. Arrow Int’l, Inc.*, 2007-Ohio-712, at ¶ 17 (Ct. App. 8th Dist. 2007) (“[u]nsworn medical expert reports are not ‘sufficient and acceptable’ evidentiary materials and must be incorporated by reference into a ‘properly framed affidavit’”) (quoting *Rogoff v. King*, 91 Ohio App. 3d 438, 444 (Ct. App. 8th Dist. 1993)); *Johnston v. Great Lakes Constr. Co.*, No. 95CA006111, 1996 WL 84632, at *3 (Ohio Ct. App. 9th Dist. Feb. 28, 1996) (“Rago’s [expert] report could only be considered by the trial court if it was submitted with the sworn affidavit of Rago himself. Without such affidavit, the report was unsworn and unauthenticated”). As a matter of law, the fact that no one from FSA has sworn to the accuracy or truthfulness of the reports would preclude any trial court from considering them as evidence.

See State v. Harrington, 172 Ohio App. 3d 595, 2007-Ohio-3796, 876 N.E.2d 626, at ¶ 14 (Ct. App. 4th Dist. 2007) (“The Woods submission does not contain any form of a jurat or certification concerning its truthfulness, the administration of an oath, or even that it was signed in the notary’s presence. Thus, the trial court could have easily discredited it completely”).

Similarly, neither the State nor the *Amicus* address the fact that the FSA reports have ***never been authenticated by Dr. Blake or someone at FSA with knowledge of the underlying testing***. For this reason, as well, they cannot be considered evidence as a matter of law. *Collins v. Collins*, No. 58035, 1991 WL 12936, at *4 (Ohio Ct. App. 8th Dist. Feb. 7, 1991) (expert report “was not properly authenticated and thus was not admissible at the hearing”); *State v. Trimble*, 2008-Ohio-6409, at ¶¶ 95-98 (Ct. App. 11th Dist. 2008) (“[t]he evidentiary materials submitted by Trimble in support of this argument lack credibility because they are unauthenticated”); *Mt. Pleasant Volunteer Fire Dep’t v. Stuart*, 2002-Ohio-5227, at ¶ 33 (Ct. App. 7th Dist. 2002) (“an expert’s report not properly authenticated is inadmissible”).

Disregarding these rudimentary principles, the *Amicus* argues that the FSA reports should have been considered as substantive evidence because they were attached as an exhibit to Mr. Apanovitch’s Petition. That argument is yet another red herring. The Petition’s reference to the FSA reports was limited to establishing further instances of prosecutorial misconduct (the withholding of exculpatory evidence) and to discrediting the FSA reports to the extent that the State might subsequently rely upon them in their opposition. (*See generally* 3/21/12 Petition.)

But more importantly, Mr. Apanovitch could not possibly introduce the FSA reports into evidence because: (i) he has no personal knowledge of the underlying testing and could not possibly authenticate them, and (ii) he lacks the expertise necessary to opine on their conclusion. *State v. Wright*, 2009-Ohio-4651, at ¶ 18 (Ct. App. 10th Dist. 2009) (“appellant has attached

unauthenticated documents containing psychological evaluations, a federal pre-sentence investigation, and various mental assessment reports . . . to his petition . . . without a proper, signed affidavit to authenticate these documents, they are not competent, relevant, and material evidence and do not establish substantive grounds for relief”); *Johnston*, 1996 WL 84632, at *3 (expert report attached to attorney affidavit was inadmissible because attorney “lacked personal knowledge of the [underlying] facts” and “was not qualified as an expert”).

Finally, the *Amicus* fails to address the fact that, even if the FSA reports were sworn and authenticated, they would still constitute inadmissible hearsay. *See Taborn*, 2000 WL 1739299, *4 (“Even had these documents been authenticated, they would not be sufficient because they are absolutely hearsay”); *Teamster Hous., Inc. v. McCormack*, No. 69583, 1996 WL 239998, at *5 (Ohio Ct. App. 8th Dist. May 9, 1996) (“pursuant to the Rules of Evidence, the [expert] report was inadmissible hearsay”); *Collins*, 1991 WL 12936, at *4 (expert report is inadmissible hearsay). The prohibition on hearsay – in both civil and criminal proceedings – is grounded in fundamental principles of fairness:

Hearsay testimony does not afford the opposing party an opportunity to confront and to cross-examine the out-of-court declarant, thereby depriving the party of the “guaranty of truthfulness resulting from the oath of [the] declarant.” Furthermore, the opportunity to test the accuracy of the declarant’s observations is not present when hearsay statements are admitted into evidence. *Potter v. Baker* (1955), 162 Ohio St. 488, 494, 55 O.O. 389, 392, 124 N.E.2d 140, 144. Therefore, hearsay statements generally lack indicia of reliability to the hearsay rule.

Teamster Hous., Inc., 1996 WL 239998, at *5.

The principles underlying the prohibition on hearsay apply in all civil court evidentiary hearings. And they are all the more compelling in post-conviction proceedings, where they are routinely applied. *Trimble*, 2008-Ohio-6409, at ¶¶ 96-98 (“[t]he evidentiary materials submitted by Trimble in support of this argument lack credibility because they are unauthenticated and are hearsay”); *State v. McKnight*, 2008-Ohio-2435, at ¶ 51 (Ct. App. 4th Dist. 2008) (the trial court

was “prohibited [] from considering the affidavit when evaluating McKnight’s postconviction petition” because an “affidavit attesting to what the jurors stated is complete hearsay”). Thus, even if the FSA reports were properly sworn and authenticated – which they were not – they would still be inadmissible hearsay.

In sum, the *Amicus*’s assertion that the trial court abused its discretion by failing to consider the FSA reports - or by shifting the burden to the State to actually introduce the reports as evidence - is meritless. Not only was it reasonable for the trial court to exclude the FSA reports from consideration, but Ohio law required it to do so.

F. Appellee’s Response to Amicus Curiae’s Proposition of Law 2: Mr. Apanovitch’s Actual-Innocence Claim Is Statutory under R.C. 2953.21(A)(1)(a) Based on Exculpatory DNA Evidence Not Available at Trial. There Is No Question or Conflict Among the Courts of Appeal that This Statutory Claim Exists; The State’s Argument Based on Non-DNA-Based Innocence Claims Is Therefore Inapposite. Moreover, It Was Not Raised below, and Should Be Deemed Waived.

In its rather convoluted second proposition of law, the *Amicus* suggests that an actual-innocence claim was not available to Mr. Apanovitch because Ohio Rev. Code § 2953.21(A)(1)(a) did not apply to the proceeding below. This inexplicable assertion flies in the face of the record in this case and, having never been raised below, cannot properly be asserted on appeal. *See Hack*, 74 Ohio St. 3d at 367 n.5, 658 N.E.2d at 1050 n.5, 1996-Ohio-167 n.5. As noted in the trial court’s opinion: “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 . . . 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.” (Trial Op. at 3.) Likewise, the trial court further held that “R.C. 2953.21 sets forth the standards to be considered by the trial court and the available means of disposition of the case,” before finding that Mr.

Apanovitch had satisfied this standard by producing unequivocal DNA excluding him as the source of semen found in the victim’s vagina, which was *the sole basis for his conviction of vaginal rape*. (*Id.* at 5.)

Despite the incontrovertible language of the statute, however, *Amicus* makes two contradictory assertions—neither of which is supported by legal or record support. First, *Amicus* asserts that Apanovitch raised a “free-standing claim of actual innocence” that is untethered from what the law allows. (*Amicus* Br. at 10.) *Amicus* further argues that, by entertaining such a claim, the Eighth District created a “significant legal conflict” because “every Ohio court to decide the issue” has rejected the claim. (*Amicus* Br. at 10-11.) But after arguing that claims of actual innocence are not cognizable in postconviction proceedings, *Amicus* then reverses itself by noting that Ohio Revised Code 2953.21(A)(1) creates a “limited actual innocence” section (*Amicus* Br. at 11) – the precise statutory provision under which Apanovitch raised his claim, the precise statutory provision under which the trial court granted relief (Trial Op. at 3, 5), and the precise statutory provision on which the Eighth District upheld the trial court’s decision (Eighth District Op. at ¶¶ 21, 33.) Both of the *Amicus*’s assertions are incorrect.

1. **Mr. Apanovitch raised his actual-innocence claim under the DNA-based actual-innocence provision of Ohio’s post-conviction-remedy statute; the *Amicus*, however, relies on court rulings relating to non-DNA petitions to assert that Ohio courts do not accept freestanding claims of actual innocence.**

Amicus asserts that “every Ohio court to decide the issue” relating to claims of actual innocence has rejected “[t]he concept of post-conviction ‘actual innocence’ claims[.]” (*Amicus* Br. at 10-11.) But *Amicus* provides citations only for cases in which the petitioners raised non-DNA claims — *i.e.*, cases in which petitioners raised their claims under provisions that do not refer to DNA, and that therefore do not fall under the DNA-based “actual innocence” claim. The ten cases on which *Amicus* relies are therefore not relevant to this matter. See *State v. Keith*, 176

Ohio App. 3d 260, 2008-Ohio-741, 891 N.E.2d 1191, at ¶ 19 (Ct. App. 3d Dist. 2008) (raising claims of newly discovered evidence relating to exculpatory information the State failed to turn over); *State v. Harrington*, 172 Ohio App. 3d 595, 2007-Ohio-3796, 876 N.E.2d 626, at ¶ 2 (Ct. App. 4th Dist. 2007) (raising claim based on actual innocence and police misconduct); *State v. Bound*, 2004-Ohio-7097, at ¶ 22 (Ct. App. 5th Dist. 2004) (raising claims based on failure of attorney to obtain bank records and prove that prosecution witnesses presented false testimony); *State v. Willis*, 2016-Ohio-335, at ¶¶ 10-11 (Ct. App. 6th Dist.), *appeal not allowed*, 146 Ohio St. 3d 1415 (2016) (presenting “documents and affidavits” relating to allegedly false trial testimony); *State v. Weaver*, No. 97CA006686, 1997 WL 823965, at *4 (Ohio Ct. App. 9th Dist. Dec. 31, 1997) (alleging that evidence, including witness recantation and that petitioner passed a polygraph post-trial, demonstrated his actual innocence); *State v. Burke*, No. 99-AP-174, 2000 WL 190569, at * 3 (Ohio Ct. App. 10th Dist. Feb. 17, 2000) (raising, *inter alia*, a claim of post-trial change of testimony by witness); *State v. Noling*, 2003-Ohio-5008, at ¶ 8 (Ct. App. 11th Dist. 2003) (raising, *inter alia*, claim of actual innocence based on affidavits of petitioner’s accomplices); *State v. Watson*, 126 Ohio App. 3d 316, 320 (Ct. App. 12th Dist. 1998) (raising claims that he did not receive effective assistance of counsel, that the State withheld favorable evidence, and that imprisoning an innocent person is unconstitutional); *State v. Hines*, No. 89848, 2008-Ohio-1927, at ¶ 3 (Ct. App. 8th Dist. 2008) (raising claims based allegedly false trial testimony).⁶

⁶ Amicus cites one case, *State v. Byrd*, 145 Ohio App. 3d 318, 328 (Ct. App. 1st. Dist. 2001) in which the petitioner specifically raised a claim of actual innocence for which the petitioner had the information at the time of trial. There, the court rejected the claim because petitioner’s trial counsel had the evidence at the time of trial, but made a strategic decision not to present it there. *Id.* The court rejected the claim that the petitioner should be allowed to subsequently bring the claim in postconviction proceedings. As with the situations in the other cases, this circumstance (Continued...)

In none of these cases was the court asked to evaluate petitions based on DNA-based claims of actual innocence. Instead, the court was asked to evaluate claims brought under the non-DNA provisions of the postconviction-relief statutes. In this case, however, the trial court and the Eighth District specifically addressed the DNA-based actual-innocence provision. The trial court thus properly granted Apanovitch relief under this provision (Trial Op. at 3, 5, 6), and the Eighth District properly affirmed the trial court’s decision (Eighth District Op. at ¶ 68).

2. **The *Amicus* incorrectly asserts that Apanovitch cannot meet the DNA-based actual-innocence provision because he asked the trial court to ignore evidence related to his claim of actual innocence. But Apanovitch presented—and the court reviewed—all admissible evidence.**

The *Amicus* concedes that an actual-innocence claim is cognizable under Ohio Revised Code § 2953.21(A)(1)(a). It nonetheless asserts that this statute “requires courts to consider all the other evidence related to a conviction” and that Mr. Apanovitch could not seek relief under the statute because “he argued that the courts below should *ignore* other available evidence not consider it.” (*Amicus* Br. at 11.) The *Amicus* does not elaborate on this argument or state what evidence Mr. Apanovitch asked the trial court to ignore. As a basic factual matter, however, the only evidence in support of a vaginal rape charge was the semen found in the victim’s vagina. **There was no other evidence to ignore.** To the extent the *Amicus* is referring to the FSA reports, those reports were not evidence for the numerous reasons stated above.

In any event, the *Amicus*’s unsupported assertion is belied by the trial court’s description of the evidence that the parties presented and that the trial court considered. The court explained that in addition to evidence provided at the hearing in 2014, it had “been supplied with extensive briefing all of which have been reviewed, along with the entire transcript of the trial, all exhibits

is inapposite here, both because Apanovitch did not have the evidence available at the time of trial, and because Apanovitch brought his claim under the DNA provision for actual innocence.

provided by counsel, all of the reported cases regarding Petitioner, and all the rulings on the three prior post-conviction petitions.” (Trial Op. at 4; see also Court Exhibit 4, attached to the Trial Op., which is a “listing of the materials reviewed, not already a part of the record . . .”).

As explained above, the court thus properly considered all admissible evidence under Ohio Revised Code § 2953.21(b) (explaining that a finding of DNA-based actual innocence requires the court to consider “all available admissible evidence related to the person’s case . . .”). The trial court did so (Trial Op. at 4 (describing admissible evidence before the court)), and the Eighth District affirmed the trial court’s decisions relating to admissibility of evidence. (Eighth District Op. at ¶¶ 43-47.) Both courts recognized that Apanovitch could and did qualify for the specific DNA-based actual-innocence provision. Unlike the argument offered by *Amicus*, these conclusions are factually and legally supported.

3. **The trial court properly acquitted Apanovitch on the one charge for which clear and convincing evidence supported a claim of innocence and dismissed a carbon copy claim to avoid double jeopardy; the court left intact all remaining charges not related to rape. The State is free to retry Apanovitch on the remaining matters.**

After making its two unsupported claims about actual innocence, the *Amicus* then asserts that even if Apanovitch properly presented a claim of actual innocence, acquittal is not an available remedy. (*Amicus* Br. at 11.) The *Amicus* not only misunderstands the trial court’s remedy, but also fails to provide legal support for its mistaken assertion.

First, the *Amicus* misunderstands the effect of the trial court’s limited acquittal: the court only acquitted Apanovitch on one charge, after finding the uncontroverted DNA evidence “meets, and exceeds, the standard of clear and convincing evidence of actual innocence as far as the vaginal rape.” (Trial Op. at 6.) What the trial court did not do, however, was acquit Apanovitch of all charges—something it recognized would be improper. Indeed, the trial court

found that owing “to the limited scope of these proceedings, the Court, at this time, may not disturb the prior rulings” relating to a variety of non-DNA matters. (Trial Op. at 4.) Instead, the court granted a new trial, as authorized by Rule 33. The State is free to retry Apanovitch on the remaining charges.

Second, and as with the unsupported assertions relating to actual innocence, the *Amicus* makes its assertion with no support. Instead, the *Amicus* claims – with a mere three sentences, two case citations, and no explanation – that the U.S. Supreme Court’s decision in *Jackson v. Virginia* determines Ohio’s interpretation of remedies available under Ohio’s postconviction statutes (*Amicus* Br. at 11-12 (claiming that “[t]he 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.”).)

The only ostensible support from the Ohio courts that the *Amicus* offers is a case that holds that “*res judicata* bars a petitioner from raising claims in postconviction proceedings that could have been raised on direct appeal.” (*Amicus* Br. at 12; citing *State v. Szefcyk*, 77 Ohio St. 3d 93, 95 (1996); emphasis added.) But that case is unrelated to the matter of an acquittal based on newly discovery evidence; as this Court explained in that case, the convicted defendant had previously raised on direct appeal the issue he sought to have the Court review. The Court said, “The court of appeals affirmed his conviction. This court denied jurisdiction. The appellee in this case fully litigated that issue. He cannot now come before this court and relitigate it simply because of a subsequent decision of this court.” *Szefcyk*, 77 Ohio St. 3d at 95.

Here, however, Apanovitch brought a new claim, supported by new evidence, to the trial court (*see* Section III.A.4, *supra*). Not only had Apanovitch not previously presented the claim and its supporting evidence in direct appeal, but he could not have done so because the State did

not provide him with that evidence until twenty-four years after the trial (and eight years after the State had conducted the initial DNA testing at issue).

Accordingly, not only is Proposition of Law 2 waived, it is also factually and legally incorrect. The *Amicus* has provided nothing of substance for this Court to address.

G. **Appellee’s Response to *Amicus Curiae’s* Proposition of Law 3: Basic Principles of Double Jeopardy Bar Retrial by the State of Ohio for A Crime on Which There Was an Acquittal, and These Principles Were Applied by the Trial Court, and Affirmed by The Eighth District Court of Appeals by Unanimous Opinion.**

The *Amicus’s* third proposition of law simply repeats the failed arguments made in the State’s third and fourth propositions of law above and fails for identical reasons.

Like the State, the *Amicus* misrepresents the record below, incorrectly claiming that the lower courts applied *Valentine* as controlling authority. Again, this argument is a red herring. Defective indictment claims of the type discussed in *Valentine* allege that a defendant has been unable to defend himself at trial because the indictment failed to give adequate notice of what was being alleged, ordinarily because it relied on vague carbon copy counts. Here, the potential constitutional violation was not inherent in the indictment itself, but instead arose only after the trial court reached its decision to dismiss the vaginal rape count. In other words, the concerns over double jeopardy did not arise until now, and thus could not possibly have been raised by Mr. Apanovitch at his trial three decades ago.

In its cursory analysis of this issue, the *Amicus* avoids tackling the clear double jeopardy violation that would result from ordering a retrial of Mr. Apanovitch on a single carbon copy count of rape by “vaginal intercourse and/or fellatio.” According to the *Amicus*, “[t]here was undisputed testimony at trial that sperm was found in both Flynn’s mouth and her vagina . . . [t]hus it was obvious to the trial judge, the jury, and the parties that one rape referred to vaginal

intercourse and the other rape charge referred to oral rape.” (*Amicus* Br. at 15.) ***But the Amicus does not even allege, much less establish from the record, which of its indistinguishable rape charges was intended to address vaginal rape, and which was intended to address oral rape.*** In the absence of such a distinction, the *Amicus* would have the trial court engage in a legal fiction, dismissing one of the two counts at random and ordering a new trial on a count that, on its face, ***alleges rape by vaginal intercourse, the precise conduct for which Mr. Apanovitch has now been acquitted.*** Such a decision would violate the very essence of the prohibition on double jeopardy.

IV. CONCLUSION

Neither the State nor the *Amicus* raises any issue of merit on this record, let alone one of public or great interest. Accordingly and for the reasons set forth above, it is respectfully submitted that the State’s jurisdictional application be denied.

Respectfully submitted,

/s/ Mark R. DeVan

MARK R. DeVAN (0003339)

WILLIAM C. LIVINGSTON (0089538)

mdevan@bgmdlaw.com

wlivingston@bgmdlaw.com

BERKMAN, GORDON, MURRAY & DeVAN

55 Public Square, Suite 2200

Cleveland, Ohio 44113

(216) 781-5245

(216) 781-8207 – Facsimile

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2016, a copy of the foregoing Memorandum in Opposition of Appellee Anthony Apanovitch was served by email to Christopher Schroeder, [cschroeder@prosecutor.cuyahogacounty.us] counsel of record for Plaintiff-Appellant State of Ohio.

/s/ Mark R. DeVan
MARK R. DeVAN (0003339)
BERKMAN, GORDON, MURRAY & DeVAN

One of the Attorneys for Defendant-Appellee
Anthony Apanovitch.