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

IN 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 SUPPORT OF JURISDICTION OF APPELLANT THE STATE OF OHIO

This is a Postconviction Death Penalty Case – An Execution Date is Not Currently Set

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EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST

Anthony Apanovitch spent 31 years on death row for the vicious rape and murder of a 33-year old midwife named Mary Ann Flynn before being released and granted a new trial as the result of a postconviction proceeding that drowned in error at every level. In this case, the evidence against Apanovitch actually became stronger, not weaker, as the years passed since his conviction. DNA testing ordered by federal courts in habeas showed Apanovitch was the source of semen found in the victim's mouth. That, combined with all of the other evidence against Apanovitch in his 1984, should have further solidified his conviction beyond the possibility of any attack.

But the trial court refused to consider that evidence, and the court of appeals held that it was allowed to do so. The court did this by reasoning that it was the State's burden to re-present the same DNA evidence that it presented to the federal district court in habeas again at the 2014 postconviction hearing. Because the State did not do so – repeatedly insisting in vain that it had no burden of proof and that the issue was res judicata – the court of appeals found that the State failed to prove that Apanovitch's DNA was in the victim's mouth.

The trial court and the court of appeals shifted the burden of proof in a postconviction hearing from the petitioner onto the State. It is directly contrary to the plain language of the postconviction statutes that requires the defendant to prove that no reasonable factfinder would have found him guilty of the offense. It disregards the rulings of this Court that factual findings made by federal courts in habeas are res judicata in subsequent state court proceedings in that case. And it erroneously substitutes the

discretionary law of the case doctrine for the mandatory res judicata effect of federal court opinions in that very case. It is an open invitation to trial and appellate courts in Ohio to disregard factual findings made by federal courts in habeas proceedings at will if the state courts merely disagree with those findings. Under the Eighth District's interpretation of the law of the case doctrine, a trial court – not persuaded by a federal judge's finding on any issue – may simply ignore the federal court's opinion on that issue unless the defendant re-proves it in state court to the trial court's satisfaction. That is both a substantial constitutional question and a question of public or great general interest.

By ignoring the evidence, the lower court rationalized itself into finding that Apanovitch had met his burden of proving a free-standing actual innocence claim, a claim not even recognized under Ohio law. The courts based this conclusion exclusively on a different DNA test of sperm found in the victim's vagina, a test that Apanovitch refused to seek under Ohio's postconviction DNA testing statute. That outside test excluded Apanovitch in favor of at least two or three unknown males. There was no evidence actually linking that sample to the murder. The only testimony in postconviction was that the oral sample that proved Apanovitch's guilt was contemporaneous to the murder. The vaginal sample, by contrast, could have been as much as five days old. But in an extremely cursory opinion, the Eighth District found that this was sufficient to meet whatever its standards are for a free-standing claim of actual innocence, without considering any of the other evidence or whether that evidence was outcome-determinative.

The Eighth District's opinion also held, for the first time, that claims of a defective indictment can be raised in postconviction. Apanovitch was originally convicted of two counts of rape. Those two counts were identically worded in the indictment, but the State

presented clear evidence at trial that there was semen in both the victims' mouth and vagina, supporting the State's argument that there were two acts of rape. Once the trial court acquitted Apanovitch of the vaginal rape, this should have left one remaining count of oral rape.

The trial court sua sponte raised a defective indictment issue in postconviction and found that the two counts were carbon-copies under *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005). The court of appeals then compounded the error by re-characterizing the issue as a double jeopardy violation, in that Apanovitch might have been forced to stand trial a second time for an act of which the trial court had acquitted him. This was despite the fact that no retrial was pending, and the trial court was explicit that it only granted Apanovitch a new trial after dismissing both counts of rape.

The Eighth District's opinion thus held that defective indictment claims, which do not rely on any evidence outside the record, are capable of being raised in a successive postconviction petition. The court further held in this case that any two counts of an indictment, if identically worded, is per se *structural error* mandating a dismissal of the count even if the jury has returned a guilty verdict on that count, separate evidence at trial supported each count, no retrial is pending. This will result in the ad hoc reversal of thousands of cases across Ohio where the indictment contains even two identically worded counts, regardless of the evidence introduced to support each count at trial. And finally, the court of appeals resurrected and relied upon *Valentine*, a case that Ohio appellate courts have repeatedly rejected and that this Court has never once cited in ten years since its decision. This Court should accept this case to clarify that a claim of duplicative counts in

an indictment cannot be raised in postconviction, is not structural error, and can be satisfied where the State separately delineates the basis for each count at trial.

As of this writing, Anthony Apanovitch – a twice-convicted rapist and a murder – is now walking the streets in Stark County, free on a minimal bond, and on release from home detention. The process that set Apanovitch free was wrong at virtually every level and wreaked havoc on Ohio's postconviction procedure at every turn to justify overturning his conviction. It will explode the categories of what claims may be brought in postconviction, erect a wall between state and federal courts sitting in proceedings in the same case, create a new category of defective indictments and immediately render that entire class subject to structural error review, and force the State to retry what is now a 32-year old aggravated murder case because the lower courts did not consider the evidence. It is an opinion that this Court cannot allow to stand for reasons more numerous and far-reaching than the guilt or innocence of the guilty rapist and murderer at its center, who benefitted most from the all of those errors. Accordingly, the State of Ohio requests that this Honorable Court accept jurisdiction over this case.

This is a postconviction death penalty case under S.Ct.Prac.R. 7.01(B)(1)(d)(v) and S.Ct.Prac.R. 7.02(B)(2). This Court has jurisdiction over this case under S.Ct.Prac.R. 5.02(A)(1) because it involves substantial constitutional questions; under S.Ct.Prac.R. 5.02(A)(2) because it involves a felony; and under S.Ct.Prac.R. 5.02(A)(3) because it involves questions of public or great general interest.

STATEMENT OF THE CASE AND FACTS

1. Anthony Apanovitch was convicted of the brutal rape and murder of Mary Ann Flynn.

In the summer of 1984, Anthony Apanovitch, a convicted sex offender and thief, painted the home of a 33-year old Mary Ann Flynn, a midwife at Metro Hospital. On the night of August 23, 1984, Apanovitch broke into Flynn's home on the west side of Cleveland, tied her up, raped her, brutally beat her, and stabbed her in the neck with a broken piece of wood from the windowsill. Her brother Martin Flynn found her body the next morning. She was lying face down with her hands tied behind her back and what appeared to be a rolled up bedsheet tied around her neck. Her body was badly beaten and bruised. The coroner found sperm in both Flynn's mouth and vagina, and a police detective visually observed the semen still in her mouth. The coroner estimated that Flynn died sometime between midnight and 6:00 a.m.

On October 2, 1984, the Cuyahoga County Grand Jury indicted Apanovitch on four counts related to Flynn's rape and murder: aggravated murder, aggravated burglary, and two counts of rape. Apanovitch's case proceeded to a jury trial, at which the State introduced the following evidence of Apanovitch's guilt:

- Six of Flynn's female friends or coworkers testified that Flynn was fearful of Apanovitch, that he was making persistently making aggressive sexual advances toward her (including in the presence of his pregnant wife Rosemarie), that he would not leave her alone, that she wanted to move away from the neighborhood, and that Apanovitch once told a neighbor in Flynn's presence that Flynn "had a nice piece of ass, that he would like to get into it and she was shocked by that."

- At 4:30 p.m. on the day of the murder, Apanovitch walked across the street from where he was working another job and asked Flynn if he could paint her basement windowsills. Flynn refused.

- Both the front and rear doors of Flynn's home were securely locked. The only unsecured entry was a basement window with a broken windowsill. The window was obscured by large bushes in front of it, and the killer would had to have been familiar with the home to know it was there. Apanovitch had asked to paint that windowsill the day of the murder.

- Apanovitch was familiar with the layout of Flynn's house. He volunteered to detectives that he had been inside every room in the house, including the basement, and asked the police if they had found his fingerprints inside the home.

- Apanovitch had scratches on his face the day after the murder that were not there the day before. The coroner testified that the scratch marks were consistent with fingernail scratches.

- Apanovitch changed his story numerous times as to how he got the scratches on his face, alternatively claiming that a beer bottle had accidentally broken and cut his face, that he had hit someone with a beer bottle, that he accidentally banged his head against a car, and that he had been in a fight.

- Apanovitch was unable to account for his whereabouts on the night of the murder. Witnesses did not confirm his presence at any of the bars he claimed to have visited that night for the period running from around 9:15-10:00 p.m. until 12:45 a.m. that night. Flynn's neighbors heard a loud a high-pitched noise in Flynn's residence around midnight.

- Flynn had paid Apanovitch $65.00 in advance, with the remaining $60.00 to be paid when he finished painting. But Flynn soon decided the arrangement was not working out and wrote Apanovitch a check for the remaining $60.00 before the job was finished. For whatever reason, that was not satisfactory, because Flynn then wrote Apanovitch a second check for $86.00 and made the notation "painting house paid in full."

- A handwritten receipt signed by Anthony Apanovitch and dated July 10, 1984 for some painting Apanovitch had done for Flynn was found under the checkbook in the kitchen table in Flynn's home. The receipt was more than a month old by the time of the murder on August 23. This indicates that Flynn spoke to Apanovitch inside her home on the day she was murdered.

- Apanovitch told his friend Dawson Goetchius that Flynn "was a really nice lady and that she was a fox and he would like to get into her pants[.]"

- Apanovitch asked three different witnesses to falsely alibi for his whereabouts on the night of August 23, and continued to insist that they do so even after they refused to lie for him.

Additional evidence that was not introduced against Apanovitch in his 1984 trial, but that was available to the trial court at the time of Apanovitch's 2014 postconviction hearing, included the fact that Apanovitch had previously been convicted of forcibly raping a 16-year old girl in 1976. The court of appeals had reversed that conviction, however, finding that the trial court erred by allowing the prosecution to call Apanovitch's attorney as a witness during trial. *State v. Apanovitch*, 8th Dist. Cuyahoga No. 37446, 1978 WL 218029 (June 15, 1978). On remand, Apanovitch pleaded guilty to a lesser-included offense of sexual battery and received a sentence of 3-10 years imprisonment. Apanovitch also had prior convictions for aggravated robbery and theft.

2. Apanovitch's conviction was repeatedly upheld through direct appeal, postconviction, and habeas proceedings.

The jury found Apanovitch guilty of aggravated murder in violation of R.C. 2903.01, with two felony-murder death specifications (rape and burglary), aggravated burglary, and two counts of rape. The jury recommended the death penalty. On January 8, 1985, the trial court concurred with the jury and sentenced Apanovitch to death. The Eighth District Court of Appeals affirmed Apanovitch's conviction on direct appeal. *State v. Apanovitch*, 8th Dist. Cuyahoga No. 49772, 1986 WL 9503 (Aug. 28, 1986). Apanovitch then appealed to this Court, which also affirmed. *State v. Apanovitch*, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987). Over the next several years, Apanovitch filed three petitions for post-conviction relief, each of which the trial court denied and the denial of which the Eighth District affirmed. See *State v. Apanovitch*, 70 Ohio App.3d 758, 591 N.E.2d 1374 (8th Dist.1991)

(first petition); *State v. Apanovitch*, 107 Ohio App.3d 82, 667 N.E.2d 1041 (8th Dist.1995) (second petition); *State v. Apanovitch*, 113 Ohio App.3d 591, 681 N.E.2d 961 (8th Dist.1996) (third petition).

In 1991, Apanovitch filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court. On July 28, 1993, the district court, in an extremely thorough opinion, dismissed Apanovitch's petition. *Apanovitch v. Tate*, N.D. Ohio No. 1:91CV2221, not reported (July 28, 1993). Apanovitch's case then languished before the Sixth Circuit for 13 years with no action.

3. For years, Apanovitch fought to prevent the DNA testing that later proved his guilt.

The coroner found sperm in Flynn's mouth and vagina and took swabs of each. Originally, the State believed that the swabs taken from the victim's body had been destroyed or lost. Apanovitch, likewise believing the DNA no longer existed, "demanded a DNA test of the supposedly-destroyed swabs, and claimed in his habeas petition's ninth ground for relief that the state had violated his constitutional rights by not preserving the evidence." *Apanovitch v. Houk*, 466 F.3d 460, 489 (6th Cir.2006). On June 24, 1992, however, the State filed a supplemental return of writ in which it explained that the slides created from the swabs had been found, securely sealed, "in a desk of an employee in the coroner's office[.]" *Apanovitch v. Houk*, 466 F.3d 460, 470 (6th Cir.2006).

The State forwarded the Trace Evidence slides to the Forensic Science Laboratory (FSA) in California for testing. On May 28, 1992, FSA issued a report finding that one slide of the oral swab could be tested, but that the second oral slide and the vaginal slide could not be tested because of the size and deterioration of those two samples. At that point, the State contacted Apanovitch's attorneys and requested that Apanovitch supply a blood

sample for testing at the State's expense. Apanovitch reversed course and refused to consent to any DNA testing. The State moved to expand the record in federal court with the three slides and asked the district court to compel Apanovitch to submit a DNA sample. Apanovitch opposed that request, arguing that the chain of custody was broken and that the tests would likely be inaccurate. *Apanovitch v. Houk*, 466 F.3d 460, 470 (6th Cir.2006).

While Apanovitch's appeal to the Sixth Circuit was pending in 2003, the Ohio General Assembly passed Senate Bill 11, "to establish a mechanism and procedures for the DNA testing of certain inmates serving a prison term for a felony or under a sentence of death." See Am.Sub.S.B. No. 11, 150 Ohio Laws, Part IV, 6498. Apanovitch never sought any DNA testing of any evidence under this law.

4. The Sixth Circuit remanded Apanovitch's case to conduct DNA testing on the semen found in the victim's mouth.

In 2006, the Sixth Circuit remanded the case back to the district court to consider whether Apanovitch suffered any prejudice under any of three remaining *Brady* claims. *Apanovitch v. Houk*, 466 F.3d 460 (6th Cir.2006). The Sixth Circuit also remanded for further adjudication of the State's request for a DNA comparison, stating that "the DNA evidence, should it be introduced and subjected to appropriate evidentiary challenges in court, might help resolve lingering questions of * * * whether Apanovitch's innocence claim can be verified." *Id.* at 489 (6th Cir.2006). The court further noted that "Apanovitch now denies that he is claiming actual innocence in order to avoid a DNA test[.]" *Id.*, at fn. 10.

On remand, Apanovitch continued to object to any DNA testing. The district court overruled Apanovitch's objection, granted the State's motion for DNA testing, and ordered Apanovitch to supply a reference sample of DNA. *Apanovitch v. Houk*, N.D. Ohio No. 1:91CV2221, 2007 WL 1394148, at *5 (May 9, 2007).

5. DNA testing in 2007 proved that Apanovitch's sperm was in Flynn's mouth.

In 2007, the DNA reference sample taken from Apanovitch was sent to FSA for comparison to the DNA from the slide containing spermatozoa found in Flynn's mouth. FSA separated the material removed from Flynn's mouth into two parts – sperm and non-sperm. The 2007 FSA report, signed by Drs. Edward Blake and Alan Keel, concluded:

> "**Anthony Apanovitch cannot be eliminated** as the source of the spermatozoa from the Mary Ann Flynn oral slide # 190729 [Item 2]. The genetic profile shared by Anthony Apanovitch and the source of the spermatozoa from the Mary Ann Flynn oral slide # 190729 [Item 2] is expected to occur in approximately one out of 285 million members of the population."

Apanovitch v. Houk, N.D. Ohio No. 1:91CV2221, 2009 WL 3378250, at *9 (August 14, 2009) (emphasis in original). "The results favored the State." *Id*., at *8.

After both parties received the FSA report, and the results were filed with the district court, Apanovitch retained his own expert, Dr. Norah Rudin, to examine the results. Dr. Rudin provided her own expert report in which she agreed that "[t]he partial DNA profile developed from the sperm cell fraction of Oral slide L90729 could have come from Anthony Apanovitch[,]" and she did not dispute the strength of the result. With regard to the non-sperm portion of the oral slide, however, Dr. Rudin concluded that there was no DNA from Mary Ann Flynn, which Dr. Rudin interpreted to mean that Flynn could not be the source of a sample purportedly taken from her own mouth. *Id.*, at *10. "However, an earlier report from FSA included a comparison of the non-sperm fraction of the oral slide and a DNA profile taken from Flynn's hair. Both contained Flynn's DNA." *Id.*, at *11.

6. The federal courts subsequently denied all of Apanovitch's appeals.

The district court denied Apanovitch's petition. *Id*. "The district court considered the new DNA evidence, which was highly inculpatory, to hold that Apanovitch was not

prejudiced under *Brady*, and, in the alternative, reached the same conclusion without considering the new DNA evidence." *Apanovitch v. Bobby*, 648 F.3d 434, 437 (6th Cir.2011). The district court also addressed the chain of custody regarding the oral and vaginal swabs and found that there was "a reasonable probability that the chain of custody had not been altered." *Apanovitch v. Houk*, at *24.

On August 27, 2009, Apanovitch filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), arguing that the district court should have held an evidentiary hearing on the DNA evidence before considering it. The district court denied that motion:

> "Contrary to Apanovitch's argument, the Court was able to review the two reports, identify the arguments and findings contained in each, and reach a conclusion. No amount of testimony from the parties could alter the conclusions drawn by the Court based on the full reports provided by each side. As such, no hearing on the issue was necessary."

Apanovitch v. Houk, at *5.

The Sixth Circuit affirmed. *Apanovitch v. Bobby*, 648 F.3d 434. The Sixth Circuit found that although it had previously instructed the district court to consider the newly discovered DNA evidence, the district court erred when it considered the DNA evidence as part of the prejudice analysis under *Brady. Id.* at 435. The Sixth Circuit then went on to reject all of Apanovitch's *Brady* claims without consideration of the DNA evidence, which it noted was highly inculpatory: "Only 1 in 285 million Caucasians have DNA consistent with that left by Flynn's killer, and Apanovitch is one such Caucasian. The odds of the DNA being consistent with that of a particular non-Caucasian are in the billions." *Id.*, at 437, fn 2.

Apanovitch appealed and the United States Supreme Court denied Apanovitch's petition for a writ of certiorari without dissent. *Apanovitch v. Bobby*, ___ U.S. ___, 132 S.Ct.

1742, 182 L.Ed.2d 535 (2012). Within days of that denial, Apanovitch filed his fourth petition for post-conviction relief.

7. After all of his appeals had been denied, Apanovitch asserted actual innocence as a last-ditch effort in his fourth post-conviction petition.

FSA returned the three slides to the Cuyahoga County Coroner's Office after its initial testing in 1992. In 2000, the Coroner's Office attempted to perform DNA testing on the remaining two untested slides. Significantly, the Coroner's Office did not do any testing of FSA Item 2, the oral slide that FSA later found in 2007 contained Apanovitch's sperm.

The Coroner's Office both swabbed and scraped the three slides. Those swabs and scrapes were labeled as Item 1.1 (swab of vaginal smear slide), Item 1.2 (scrapings of vaginal smear slide), and Item 2.1 (swab of oral smear slide). The coroner tested those items in 2000 and concluded "that there was so little material left on those slides that she could not extract enough DNA to obtain a clear profile."

Apanovitch filed his fourth post-conviction petition in 2012. The trial court held a two-day hearing on October 14-15, 2014. Two witnesses testified in the hearing: Dr. Rick Staub for the defense and Dr. Elizabeth Benzinger for the State. Dr. Staub testified that his review of the testing done by the Coroner's Office in 2000 indicated that Coroner's Item 1.2 – the scrapings from the vaginal swab – contained two male DNA profiles, both of which excluded Apanovitch. In his opinion, Coroner's Item 1.2 was not contaminated. This was the only slide that the Coroner's Office found contained Flynn's DNA. Thus, Apanovitch argued, the trial court should only consider that vaginal slide as evidence because the other slides must have been contaminated. Dr. Staub did not review any testing of FSA Item 2, the oral slide that FSA found in 2007 contained Apanovitch's sperm.

Dr. Benzinger testified that "we have at least three people's DNA in this sample." She believed the sample was contaminated. The major male DNA profile from Coroner's Item 1.2 was submitted to CODIS and no matches were found. Dr. Benzinger testified that there were more sperm in the oral samples than in the vaginal samples. She further testified that sperm could only persist in the mouth "[v]ery often much less than a day, a matter of hours." Sperm would persist in the vagina, however, for up to five days. As a result, Dr. Benzinger concluded that "[t]he oral sample would definitely have been near the time of death. The vaginal sample, it could be five days old or it could be the same age as the oral sample."

On February 12, 2015, the trial court granted Apanovitch's petition, vacated his conviction for the vaginal rape, and then dismissed the remaining count of oral rape as duplicative under *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005). The Eighth District Court of Appeals affirmed. *State v. Apanovitch*, 8th Dist. Cuyahoga Nos. 102618 and 102698, 2016-Ohio-2831. Now before this Honorable Court is the State's request that this Court accept discretionary jurisdiction and reverse the Eighth District's decision.

LAW AND ARGUMENT

STATE'S PROPOSITION OF LAW I: A factual finding made by a federal court in a habeas proceeding is res judicata in subsequent state court proceedings in the case.

In 2009, the federal district court found that DNA testing on FSA item 2 – an oral slide created from a swab from the victim's mouth – revealed Anthony Apanovitch's sperm. The sample was so strong that the genetic profile was expected to occur in approximately 1 out of 285 million Caucasians. *Apanovitch v. Houk*, N.D. Ohio No. 1:91CV2221, 2009 WL 3378250, at *9 (August 14, 2009). That evidence was extremely relevant to this case. It

proved, without any doubt, that Apanovitch was the killer. But this – the most crucial evidence in this case – was never even considered by the trial court when it set Apanovitch free after 31 years on death row.

The trial court refused to consider the DNA evidence because the State did not re-present that same evidence again in the 2014 postconviction hearing that it had already presented in federal court. The Eighth District held that the trial court was permitted to disregard the federal court's factual findings by citing to the "law of the case" doctrine and then finding that doctrine was discretionary. *Apanovitch*, ¶¶ 35-47. All of this was wrong. Once a federal court sitting in habeas review makes a factual finding in the case, that finding is res judicata in all subsequent state court proceedings. It cannot be disregarded because the trial court does not believe it or does not want to follow it. The State had no burden of proof in postconviction and was not required to produce any witnesses to re-prove what it had already proven in federal habeas. And the "law of the case" doctrine was not applicable to this situation such that the trial court could cite it and disregard it.

1. Res judicata applies to all factual findings made by federal courts in habeas proceedings.

The federal court opinions, and the factual findings within them, were a part of the record that the trial court was required to consider before ruling. Once the federal courts ruled upon the issue of the DNA evidence of Apanovitch's sperm in Flynn's mouth, that fact was res judicata in the trial court in subsequent postconviction proceedings. "[T]o the extent to which a federal court judgment operates as res judicata in the federal court, it also operates as res judicata in Ohio state courts." *Johnson v. Cleveland City School Dist.*, 8th Dist. Cuyahoga No. 97125, 2012-Ohio-159, ¶ 12.

"Further, the Ohio Supreme Court has held that a claim litigated to finality in the United States District Court cannot be re-litigated in a state court when the state claim involves the identical subject matter previously litigated in federal court, and there is presently no issue of party identity or privity." *Id.*, citing *Rogers v. Whitehall*, 25 Ohio St.3d 67, 494 N.E.2d 1387 (1986), at syllabus. In fact, the Eighth District itself previously recognized this principle *in Apanovitch's own case*. "These claims were litigated in the federal court, so *res judicata* applies[.]" *State v. Apanovitch*, 107 Ohio App. 3d 82, 88, 667 N.E.2d 1041 (8th Dist.1995), citing *Rogers*, at syllabus.

"For a claim to be barred on the grounds of res judicata, the new claim must share three elements with the earlier action: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits." *McGowan v. Cuyahoga Metro Hous. Auth.*, 8th Dist. Cuyahoga No. 79137, 2001 Ohio App. LEXIS 3699, *9 (Aug. 23, 2001). All three of those elements exist here to render the DNA evidence considered by the federal courts res judicata in any subsequent state court proceedings.

The effect of res judicata is even stronger in this case where the federal district court specifically rejected Apanovitch's motion to alter or amend the judgment in which he argued that the district court should have held an evidentiary hearing on the DNA evidence before considering it:

> "Contrary to Apanovitch's argument, the Court was able to review the two reports, identify the arguments and findings contained in each, and reach a conclusion. No amount of testimony from the parties could alter the conclusions drawn by the Court based on the full reports provided by each side. As such, no hearing on the issue was necessary."

Apanovitch v. Houk, N.D. Ohio No. 1:91CV2221, 2009 WL 3246907, at *5 (Oct. 6, 2009).

The Sixth Circuit affirmed and found that although the district court erred when it considered the DNA evidence as part of the prejudice analysis under *Brady*, that nevertheless, "[n]ew, *non-Brady*, evidence is enlightening as to whether a petitioner is – seen as of now – actually innocent." *Apanovitch v. Bobby*, 648 F.3d 434, 437 (6th Cir.2011).

2. The petitioner bears the burden of proof at a postconviction hearing. The State has no burden to re-prove facts previously established in federal habeas.

To justify the decision to ignore the evidence, both the trial court and the court of appeals shifted the burden in the postconviction hearing from Apanovitch to the State of Ohio. "In a petition for postconviction relief, the petitioner * * * bears the burden of proof." *State v. Cline*, 2d Dist. Champaign No. 2013 CA 51, 2014-Ohio-4503, ¶ 14. "A postconviction hearing is a civil proceeding governed by the Rules of Civil Procedure. In such a hearing, the petitioner bears the burden of proof." *State v. Evans*, 8th Dist. Cuyahoga No. 72330, 1998 Ohio App. LEXIS 5067, *7 (Oct. 29, 1998) (citation omitted).

Here, however, the trial court placed the burden on the State of Ohio to call Dr. Blake as a witness to re-present the 2007 DNA test results in a state postconviction hearing, despite the fact that the federal district court had already considered that evidence and ruled that no evidentiary hearing was necessary. The State reiterated several times that it had no intention of calling Dr. Blake at the hearing because it had no burden of proof. When defense counsel asked the trial court if it was then going to consider Dr. Blake's findings in federal court, the trial court declared: "Can't get it in without him. * * * I don't know any evidence rule that would allow that, unless you stipulated to it." Later, the trial court claimed to the State, "You waived Dr. Blake. * * * So how can I rule on evidence not put before me?" But the evidence was before the court as a factual finding made by the

federal district court sitting in habeas. There was no constitutional or evidentiary bar to considering the federal court's findings.

3. There is no right to confront witnesses in postconviction proceedings.

A defendant's right to confront witnesses against him is a trial right, not a postconviction right. The Ohio Constitution explicitly refers to the right to confront witnesses as a trial right: "**In any trial**, in any court, the party accused shall be allowed * * * to meet witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf[.]" Ohio Constitution, Article I, Section 10 (emphasis added).

This Court has previously held that the right to confront witnesses does not apply in postconviction hearings. "[C]onfrontational rights do not apply to all types of hearings. All that due process requires with respect to post-conviction reports is giving the defendant a chance to rebut any alleged inaccuracies." *State v. Williams*, 23 Ohio St.3d 16, 23, 490 N.E.2d 906 (1986), citing *Wolff v. McDonnell*, 418 U.S. 539, 567, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (confrontation and cross-examination "are not rights universally applicable to all hearings"). *See also State v. Cureton*, 9th Dist. Medina Nos. 03CA0009-M, 03CA0010-M, 2003-Ohio-6010, ¶ 31 ("In Ohio, post-conviction relief proceedings are civil in nature. Consequently, Cureton has no Sixth Amendment rights at a post-conviction hearing" or at a Crim.R. 33 hearing on a motion for a new trial); *State v. Hayden*, 2d Dist. Montgomery No. 20657, 2005-Ohio-4024, ¶ 18 ("we also agree with the State that the Sixth Amendment right of confrontation does not apply to postconviction relief proceedings, because those proceedings are civil in nature").

Under this Court's decision in *Williams*, this should have meant at most that Apanovitch had an opportunity – in a postconviction setting – to rebut Dr. Blake's 2007 FSA

report showing Apanovitch's sperm in the victim's mouth. Apanovitch, correctly understanding that, originally couched his 2012 postconviction petition as an attack on Dr. Blake's report, and attempted to depose Dr. Blake. But Dr. Blake refused to cooperate "unless he was paid substantial hourly fees and costs." *Apanovitch*, ¶ 22. And when the trial court made it clear that it planned to hold Apanovitch's failure to call Dr. Blake against the State rather than against Apanovitch, Apanovitch shrewdly withdrew his request. This should have resulted in a preservation of the status quo regarding the 2007 DNA testing – the federal district court had found that Apanovitch's sperm was inside the victim's mouth, and that was the last word on the subject. But the court misapplied the burden of proof, penalizing the State for failing to prove what it had already proven in federal court.

4. The Rules of Evidence do not apply in postconviction proceedings.

Nor did the Rules of Evidence preclude the trial court from considering Dr. Blake's report as hearsay. Evid.R. 102 provides that the rules of evidence are subordinate to "substantive statutory provisions." Ohio's post-conviction proceedings are statutory by nature. "To a large degree the post-conviction remedy provided by R.C. 2953.21 is a procedural review, a special statutory proceeding, with different rules of pleading, different rules of evidence, different burdens of proof, and different judgments than exist in criminal trials." *State v. Barnes*, 7 Ohio App.3d. 83, 84, 454 N.E.2d 572 (3d Dist.1982).

Specifically, R.C. 2953.21(A)(1)(a) requires the trial court to consider any postconviction DNA testing "in the context of and upon consideration of all available admissible evidence related to the person's case[.]" And R.C. 2953.21(C) provides that before granting a hearing on a petition, "the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records

pertaining to the proceedings against the petitioner[.]" "It is axiomatic that when it is used in a statute, the word 'shall' denotes that compliance with the commands of that statute is *mandatory*." *Ohio Dept. of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St.3d 532, 534, 605 N.E.2d 368 (1992) (emphasis added). Moreover, Apanovitch had attached the 2007 FSA report to his own petition, making the results part of the record himself.

5. The State never stipulated that the court should ignore the factual findings of the federal district court in habeas.

Apanovitch did not contest that the federal court's findings were res judicata, and the Eighth District did not discuss res judicata in its opinion. Instead, the court of appeals relied upon a misstatement of the record to find that the State stipulated "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." *Apanovitch*, ¶ 43. The record in this case is replete with instances in which the State reiterated, at least eight different times, that it was not going to call Dr. Blake as a witness at the 2014 postconviction hearing because it did not have the burden of proof. The scope of the hearing was limited to the DNA testing done by the Medical Examiner's Office in 2000-2001 – testing that Dr. Blake knew nothing about. The State stipulated that it would not call Dr. Blake as a witness at a hearing on a separate issue; not that the State would not "rely on any of Dr. Blake's findings." *Id.* This is a fiction that the court of appeals relied upon to justify its disregard of the federal court's opinion.

6. Res judicata, not the law of the case doctrine, applies to federal court habeas proceedings in the same case.

Rather than considering the application of res judicata, the court of appeals substituted in the doctrine of "law of the case," found that doctrine to be discretionary, and then held that the trial court was within its discretion to disregard the federal court's

findings. Neither the State nor Apanovitch ever relied upon the law of the case doctrine in the lower courts. That substitution was outcome determinative in this case.

Unlike the law-of-the-case doctrine, res judicata is not discretionary:

> "This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

Hart Steel Co. v. R.R. Supply Co., 244 U.S. 294, 299, 37 S.Ct. 506, 61 L.Ed. 1148 (1917). "Res judicata is a substantive rule of law that applies to a final judgment, whereas the law-of-the-case doctrine is a rule of practice analogous to estoppel." *Hopkins v. Dyer*, 104 Ohio St. 3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 22, citing *Gohman v. St. Bernard*, 111 Ohio St. 726, 730, 146 N.E. 291 (1924) ("The doctrine of the law of the case differs in many important respects from *stare decisis* and *res adjudicata*, and yet has many things in common with both of those doctrines. By the great majority of cases it is not declared as a rule of substantive law, but rather as a rule of practice").

Once a federal court makes a factual or legal finding in a habeas proceeding in the petitioner's case, that finding is binding under res judicata in subsequent state court proceedings. It is not potentially applicable under a discretionary law of the case doctrine that a state court is free to accept or reject. "[I]t has long been recognized that the doctrine of res judicata applies in a proper case as between federal court and state court judgments." *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69, 494 N.E.2d 1387 (1986).

This is fundamentally different than the law of the case. "The prior ruling may have been followed as the law of the case but there is a difference between such adherence and

res judicata; one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission." *Southern R. Co. v. Clift*, 260 U.S. 316, 43 S.Ct. 126, 67 L.Ed. 283 (1922). And once again, this is a principle that the Eighth District itself previously recognized in Apanovitch's own case. *See State v. Apanovitch*, 107 Ohio App.3d 82, 89, 667 N.E.2d 1041 (8th Dist.1995) ("res judicata is not discretionary in its application").

By substituting in the inapplicable law of the case doctrine and then misapplying it, the Eighth District has held that trial courts have free reign to ignore all factual findings made by federal courts sitting in habeas. This sets a dangerous precedent whereby state courts can pick and choose *à la carte* which portions of federal habeas proceedings apply to them. The State therefore respectfully asks this Court to accept discretionary jurisdiction over the State's first proposition of law and hold that factual findings made by a federal court in habeas are res judicata in subsequent state court proceedings in the case.

STATE'S PROPOSITION OF LAW II: A petitioner cannot prove his actual innocence based solely on DNA evidence excluding the petitioner without first establishing an evidentiary link between that DNA and the murder.

DNA testing "is not a magic bullet in post-conviction cases." *State ex rel. Richey v. Hill*, 216 W.Va. 155, 165, 603 S.E.2d 177 (2004), citing Jennifer Boemer, Note, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 Wm. Mitchell L. Rev. 1971, 1985 (2001). It "is only as powerful as it is relevant in a given scenario." *Id*. In this case, a compelling litany of evidence established Apanovitch's guilt to the jury in 1984, even without the benefit of the DNA testing proving his sperm was in the victim's mouth. Apanovitch contested none of that evidence in his postconviction petition, instead relying entirely on a DNA test showing that sperm found in the victim's vagina

belonged to two, or possibly three, unknown males. In upholding the trial court's decision to grant Apanovitch a new trial, the court of appeals jettisoned all of that evidence and maintained a laser-like focus solely on the single DNA test Apanovitch relied upon.

"DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *District Attorney's Office v. Osborne*, 557 U.S. 52, 62, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). That holding was lost in this case. The presence of multiple unknown male samples indicates contamination. And the State's expert testified that sperm samples can persist in the vagina for up to five days, meaning that any DNA found there could have come from a consensual partner. But neither the trial court nor the court of appeals discussed either contamination or consensual sex at all anywhere in their opinions in this case. Nor did they deal with the array of evidence against Apanovitch, instead believing that one DNA test excluding the defendant conclusively proved his innocence. This is the "magic bullet" theory of postconviction DNA – the belief that a single piece of evidence found at the scene that does not reveal a match for the defendant's DNA can refute all of the other evidence in a case. It is not sound science, it is not sound law, and this Court should use this case to establish that more is required to prove actual innocence.

1. The presence of two or three unknown male profiles strongly suggests contamination.

Depending on which of Apanovitch's experts is to be believed, the vaginal sample contained DNA from two or three different male contributors. The Ninth District recently recognized 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*, 9th Dist. Summit No. 26775, 2014-Ohio-1035, at ¶ 118. Contamination is a more likely explanation

than that the State missed not one, but two real killers, both of whom raped Flynn, deposited sperm in her vagina, deposited Apanovitch's sperm in her mouth, and then eluded capture for 30 years. The lower courts did not consider this.

2. The DNA in the vaginal slide could have been as much as five days old at the time of the murder.

The DNA testing results on Coroner's Item 1.2, even if accurate, do not prove Apanovitch's innocence. There is no indication as to whether that sperm was deposited in Flynn's vagina through consensual or nonconsensual sex. There is no evidence as to when it occurred. Dr. Benzinger testified that sperm can persist in the vagina up to five days after being deposited, but only for a matter of hours in the mouth. Dr. Benzinger's testimony on this point was uncontested in the lower courts.

The sperm in Flynn's mouth was thus deposited contemporaneously to her death. This meant that whoever deposited the sperm in Flynn's mouth was the killer, creating an evidentiary nexus between that sample and the murder. The same cannot be said for the sperm in the victim's vagina, which lacks any such nexus of timing. Without establishing that evidentiary link, Apanovitch failed to prove anything more than that the victim had consensual sex with at least one unknown male in the five days prior to her death.

3. The trial court was required to consider any DNA testing results in the context of all the other evidence in this case proving Apanovitch's guilt.

The entirety of the Eighth District's opinion regarding whether Apanovitch proved his actual innocence by clear and convincing evidence – the State's first assignment of error on appeal – reads as follows:

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

> Moreover, contrary to the state's position, there was not 'voluminous circumstantial evidence' against Apanovitch. As the dissent in Apanovitch's appeal to the Ohio Supreme Court noted, the 'evidence of guilt in this case * * * is far from overwhelming.' *Apanovitch*, 33 Ohio St.3d at 29, 514 N.E.2d 394 (Brown, J., concurring and dissenting).

Apanovitch, ¶¶ 44-45. This sole citation to a dissenting opinion is the sum total of what the Eighth District felt was necessary in this case to prove that "no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted[.]" R.C. 2953.21(A)(1)(a).

By contrast, here is the evidence that the neither the trial court nor the court of appeals made any attempt to account for in their opinions:

- Six witnesses testified that Flynn was afraid of Apanovitch because he had made sexual advances toward her,
- Apanovitch tried to convince three other witnesses to alibi for him on the night of Flynn's murder, none of whom would do so because they did not see him that night,
- Apanovitch painted Flynn's house, had been inside the house, and was familiar with its layout,
- The killer entered the home through a broken window to the basement hidden behind a bush that Apanovitch was aware of,
- Apanovitch could not account for his whereabouts on the night of Flynn's murder and changed his story multiple times,
- Apanovitch had scratches on his face the day after the murder that were not there the day before and changed his story as to how he got them,
- Apanovitch was a convicted sex offender and had multiple felony convictions,
- Apanovitch spoke to Flynn on the afternoon of the day she was murdered,
- Apanovitch's receipt was found under Flynn's checkbook on her kitchen table, indicating he had been inside the house that day,
- Apanovitch told a co-worker, Dawson Goetchius, that Flynn was "a real fox. I would like to get into her pants",

- All of the bars Apanovitch claimed to be at the night of Flynn's murder were within walking distance of Flynn's home, except for the Comet Bar, which neither of the two bartenders at the Comet that night could verify he was present in after 7:00 p.m.

This evidence was sufficient for the jury to convict Apanovitch in 1984 and for appellate courts at every level to uphold that conviction in the 30 years since. That evidence was bolstered even further by the 2007 DNA results proving that Apanovitch's sperm was in Flynn's mouth. Dr. Benzinger's testimony is the only evidence in this record that weighs the evidentiary value of the oral DNA against the vaginal DNA. And her testimony, like the 2007 DNA result and all of the circumstantial evidence against Apanovitch, favors the State.

Ohio's postconviction statute is intended to be inclusive, requiring consideration of "all available admissible evidence[.]" R.C. 2953.21(A)(1)(a). The court of appeals blinded itself to all of the trial evidence and the existing DNA of Apanovitch's sperm in Flynn's mouth, and maintained a laser-like focus solely on one of the six slides that contained DNA from at least two or three unknown males. This fell short of the court's duty to review the entirety of the record.

4. The court failed to consider or account for the existence of semen in the victim's mouth – a DNA test that would have to be considered outcome-determinative.

There was also no evidence anywhere in the record suggesting that the DNA test of the vaginal sample was outcome-determinative. Apanovitch never sought postconviction DNA testing under R.C. 2953.74(B)(1), which would have required a showing that the testing "would have been outcome determinative at that trial stage in that case[.]" The only testimony that any DNA was outcome-determinative came from Dr. Benzinger, who testified that the oral sample – not the vaginal sample – would have to be deposited at or near the time of the victim's death.

The fact that sperm was found in Flynn's mouth was in the record before the trial court because the coroner testified to it in the 1984 trial. The court of appeals held that the trial court was free to disregard the DNA test results of the oral sample by shifting the burden to re-present that evidence onto the State. The court then had to adopt the legal fiction that there was sperm in the victim's mouth, but the identity of who deposited that sperm was unknown. No trial court would ever find a defendant had proven his actual innocence with that DNA remaining untested. Those results are obviously outcome-determinative. But because the lower courts did not apply the postconviction DNA statute, Apanovitch was allowed to prove a freestanding claim of "actual innocence" without satisfying any of the relevant statutory requirements.

The State therefore respectfully asks this Court to accept discretionary jurisdiction over the State's second proposition of law and hold that a petitioner cannot prove his actual innocence based solely on DNA evidence excluding the petitioner without first establishing an evidentiary link between that DNA and the murder.

STATE'S PROPOSITION OF LAW III: Because a claim of a defective indictment does not depend on evidence outside the record, such a claim cannot be raised or considered in postconviction proceedings.

The trial court's decision to grant Apanovitch a new trial was only possible once it vacated both of his convictions for rape. A valid conviction on either count meant that Apanovitch was still guilty. Apanovitch, however, had never sought any testing of the oral slide proving his sperm was in the victim's mouth, and none of the evidence introduced in the 2014 postconviction hearing touched on his conviction for oral rape at all. To get around that problem, the trial court sua sponte raised an issue in its decision that none of the parties to this case had ever raised in 31 years of litigation.

The trial court cited to the Sixth Circuit's decision in *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005), which held that an indictment that included 20 carbon-copy counts of rape and 20 carbon-copy counts of felonious sexual penetration violated the defendant's rights to notice of the charges and double jeopardy protections. The trial court observed that there were two identical counts of rape in Apanovitch's indictment. Even if the trial court had been correct to acquit Apanovitch of the vaginal rape, this should have resulted in one remaining count of rape, that being the oral rape. But the trial court then held that, once it acquitted Apanovitch of the vaginal rape, this created a defective indictment because the court could not tell which count referred to which rape. Its solution for this was to dismiss the remaining count of oral rape as a carbon-copy under *Valentine*.

1. The postconviction process is limited to claims that could not have been brought on direct appeal because they rely on evidence outside the record.

"[P]ostconviction state collateral review itself is not a constitutional right, even in capital cases." *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). "States have no obligation to provide" postconviction review at all. *Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Ohio's General Assembly has chosen, in its discretion, to enact a postconviction statute. The post-conviction process in Ohio "is a means to reach constitutional issues which would otherwise be impossible to reach because the evidence supporting those issues is not contained in the trial record." *State v. Dunkle*, 10th Dist. Franklin No. 13AP-687, 2014-Ohio-1028, ¶ 10.

The defendant's ability to raise issues in postconviction proceedings, however, is limited by res judicata. Under the doctrine of res judicata, a defendant is barred from raising an issue in a petition for postconviction relief if the defendant raised or could have raised the issue at trial or on direct appeal. *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 671

N.E.2d 233 (1996). Res judicata is a "proper procedural bar[]" that Ohio "is free to impose * * * to restrict repeated returns to state court for postconviction proceedings." *Slack v. McDaniel*, 529 U.S. 473, 489, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

"In order to overcome the res judicata bar, the petitioner must show, through the use of extrinsic evidence, that he or she could not have appealed the original constitutional claim based on the information in the original trial record." *State v. Cody*, 8th Dist. Cuyahoga No. 102213, 2015-Ohio-2764, ¶ 16. "Said another way, issues properly raised in a petition for post-conviction relief are only those that could not have been raised on direct appeal because the evidence supporting such issues is outside the record." *Id.*

Generally, such evidence is attached to the petition in the form of affidavits or newly-discovered evidence. In the absence of such evidence, res judicata bars the trial court from considering or granting postconviction relief on that claim. *See State v. Harrison*, 8th Dist. Cuyahoga No. 79434, 2002 Ohio App. LEXIS 1078, at *7-8 (Mar. 14, 2002) ("a petition for post-conviction relief is a very narrow civil remedy which allows a trial court to consider only issues dehors the record, that is, outside of the actual record or trial transcript in a case"); *State v. Murphy*, 10th Dist. Franklin No. 00AP-233, 2000 Ohio App. LEXIS 6129, at *7 (Dec. 26, 2000) ("issues properly before a court on a petition for postconviction relief are issues which could not have been raised on direct appeal due to the fact that the evidence supporting those issues can only be found outside the record").

2. A *Valentine* issue is not cognizable in post-conviction because it is entirely based on the record.

Apanovitch could not have raised a *Valentine* claim in his 2012 postconviction petition, and the trial court erred by sua sponte raising it for him and deciding the case based on that improperly-raised issue. "Errors or deficiencies in an indictment are not

outside the record; therefore, they can only be attacked on direct appeal." *State v. Grimm*, 2d Dist. Miami Nos. 96-CA-37, 96-CA-38, 1997 Ohio App. LEXIS 1637, *5 (Apr. 25, 1997), citing *Midling v. Perrini*, 14 Ohio St.2d 106, 107, 236 N.E.2d 557 (1968) (a "judgment of conviction cannot be collaterally attacked on the ground that the indictment fails to state one or more essential elements of the offense"). "It follows that a court may apply the doctrine of res judicata to bar a petition for post-conviction relief if it is based upon a claim that the indictment is insufficient or defective, since this claim would not require the use or consideration of matters outside the original record." *Id.* at *6. *See also State v. Thompson*, 5th Dist. Ashland No. 08 CA 018, 2008-Ohio-5332, ¶ 26 ("Post-conviction relief is not available to challenge the validity or sufficiency of an indictment as an adequate remedy exists by direct appeal"); *State v. Hall*, 9th Dist. Lorain No. 95CA006065, 1996 Ohio App. LEXIS 947, *6-7 (Mar. 13, 1996) ("a defective indictment is apparent from the record, and this issue could have been raised at trial or on direct appeal").

The Second District has specifically applied res judicata to hold that *Valentine* issues may not be raised for the first time in post-conviction proceedings. "The alleged insufficiency of the content of the indictments would have been apparent at trial, and could have been raised on direct appeal. It is not a subject for post-conviction relief." *State v. Pillow*, 2d Dist. Greene No. 2010-CA-71, 2011-Ohio-4294, ¶ 28, citing *State v. King*, 2d Dist. Clark No. 2001-CA-73, 2002 Ohio App. LEXIS 348, *4 (Feb. 1, 2002) ("We also agree with the State that the petition is barred by *res judicata*, since any defect in the indictment and any insufficiency in the evidence could and should have been urged in King's direct appeal from his conviction and sentence"). Apanovitch thus could not have raised a *Valentine*

issue in any postconviction context even if he had wanted to. And as his decision not to do so at any point in 31 years of litigation irrefutably demonstrates, he did not want to.

3. A *Valentine* issue cannot be raised under the narrower restrictions for untimely or successive postconviction petitions.

The trial court's decision to sua sponte raise a *Valentine* issue is even more egregious in this case because the postconviction petition at issue was a successive and untimely petition. Ohio law thus placed even greater restrictions on the trial court's ability to consider it. Under R.C. 2953.23(A)(1)(a), a trial court may only entertain an untimely or successive petition if one of two conditions is met. The petitioner must either show that (1) "the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief," or (2) that "subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right."

Neither of those exceptions was at issue in this case. The first exception is inapplicable because there were no new facts presented in the 2012-2015 postconviction proceedings relevant to *Valentine*, much less any new facts that Apanovitch was somehow "unavoidably prevented" from discovering. The trial court stated in its order that looked only at the 1984 indictment, the docket, and the jury instructions from trial. All of that evidence was available to Apanovitch continually throughout the 30-year history of this case. Apanovitch chose never to raise a *Valentine* issue.

The second exception is equally unavailable. Although R.C. 2953.23(A)(1) allowed Apanovitch to raise violations of any rights subsequently recognized by the United States

Supreme Court, *Valentine* is not a decision by the Supreme Court. It did not recognize a new federal or state right that is to be applied retroactively. And even if it did satisfy those requirements, Apanovitch's petition did not "assert[] a claim based on that right." R.C. 2953.23(A)(1)(a). Apanovitch never raised the issue at all.

4. This Court's decisions in *Busch* and *Broughton* do not allow a trial court to reach past the postconviction statute and grant relief on a defective indictment claim.

The Eighth District in its opinion allowed, for the first time, a defective indictment claim to be brought in postconviction. *Apanovitch*, ¶¶ 48-55. For this, the court cited to this Court's decision in *State v. Busch*, 76 Ohio St.3d 613, 669 N.E.2d 1125 (1996), for the proposition that a trial court has the discretion to sua sponte dismiss an indictment prior to trial in the interests of justice. The court also cited to this Court's decision in *State v. Broughton*, 62 Ohio St.3d 253, 581 N.E.2d 541 (1991), in which this Court sua sponte addressed the issue of whether a trial on a second indictment would violate the defendant's double jeopardy rights where the trial court originally dismissed the first indictment as defective. Both of these cases are limited to direct appeals. Neither of them has anything to do with postconviction proceedings at all.

There is no dispute that – if the indictment actually was defective in this case – the trial court could have dismissed any or all of the counts in the indictment prior to Apanovitch's conviction. There is also no dispute that this or any other reviewing court could have dismissed the indictment if it had reversed Apanovitch's conviction on direct appeal. That is not what happened in this case. Instead, the trial court sua sponte raised the issue of a defective indictment in a postconviction proceeding. Those proceedings are governed by a specific statute, R.C. 2953.23, in which Ohio's General Assembly has strictly

regulated what claims a trial court may hear. Those regulations are exceptionally strict in the case of an untimely and successive *fourth* petition.

The Eighth District's opinion brushes aside all of the jurisdictional requirements of R.C. 2953.23 and essentially allows a trial court presiding over a postconviction hearing to raise any issues it wants in the interests of justice. It is difficult, if not impossible, to see what issues are now beyond the scope of an untimely and successive postconviction. A trial court sitting in postconviction may now consider issues that do not depend on any new evidence the petitioner was unavoidably prevented from discovering, any new federal or state right recognized by the Supreme Court, or any evidence outside the record at all. The lower courts do not even have to address the issue of res judicata. Apanovitch's indictment read the same in 2015 as it did when the Grand Jury returned it in 1984. Not one word changed in that time, nor did any party to this case ever claim that it did.

5. The trial court improperly raised and decided the case based on a new issue without giving the parties notice or an opportunity to be heard.

Additionally, the trial court should not have sua sponte raised or discussed *Valentine* in its decision because doing so deprived the parties of their right to notice and an opportunity to be heard. This Court recently prohibited lower courts 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 v. Tate*, 140 Ohio St. 3d 442, 2014-Ohio-3667, 19 N.E.3d 888, at ¶ 21. "The essential requirements of due process * * * are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. Of Education v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487,

84 L.Ed.2d 494 (1985). But the trial court violated that rule by sua sponte raising and relying upon *Valentine*.

In 31 years of litigation, Apanovitch never raised a *Valentine* issue. No judge to have heard Apanovitch's case at either the state or federal level ever raised a *Valentine* issue. None of the parties to this case ever contemplated that there might be a *Valentine* issue until the trial court read its decision aloud from the bench on February 12, 2015. Prior to that, the trial court never notified the parties that it believed there might be a *Valentine* issue and never gave them the opportunity to brief or argue whether *Valentine* had any application to this case at all. This was despite the fact that the trial court held a two-day hearing on the petition, and that the hearing came more than two-and-a-half years after Apanovitch filed his petition on March 21, 2012. There was simply no reason whatsoever for the court not to give the parties an opportunity to address the issue.

All of this failed this Court's mandate for lower courts to afford both parties the opportunity to be heard before ruling on a new and unbriefed argument. If the State had been given the opportunity to respond, it would have brought all of the aforementioned case law holding that defective indictment claims are outside the scope of postconviction review to the trial court's attention. The State never had that opportunity. The court of appeals acknowledged that "in some instances, a court's raising of an issue sua sponte without allowing the parties to brief the issue can be a violation of the parties' due process rights." *Apanovitch*, ¶ 53. That is what happened in this case.

The State therefore respectfully asks this Court to accept discretionary jurisdiction over the State's third proposition of law and hold that claims regarding defective

indictments, including *Valentine* claims, cannot be raised in postconviction because they do not depend on evidence outside the record.

STATE'S PROPOSITION OF LAW IV: ***The existence of multiple, identical counts in an indictment does not violate a defendant's protections against double jeopardy where the evidence at trial delineates a separate factual basis for each count.***

1. No *Valentine* issue exists where the State delineates the factual basis for each count at trial.

Even if the trial court could have considered a *Valentine* issue in this case, it erred on the merits by finding that such an issue existed. The Sixth Circuit noted in *Valentine* that "the constitutional error in this case is traceable not to the generic language of the individual counts of the indictment but to the fact that there was no differentiation among the counts." *Valentine,* at 636. As a result, Valentine was "prosecuted and convicted for a generic pattern of abuse rather than for forty separate abusive incidents." *Id.* at 634.

Valentine thus requires a trial court to look to the evidence and argument at trial to determine whether there was any differentiation between the counts. The Sixth Circuit observed that any defect in Valentine's indictment "might have been cured had the trial court insisted that the prosecution delineate the factual basis for the forty separate incidents either before or during the trial." *Id.* If the State can satisfy the requirements of *Valentine* by delineating the factual basis for each count at trial, then it is not required to do so in the indictment or bill of particulars. *See State v. Freeman*, 8th Dist. Cuyahoga No. 92809, 2010-Ohio-3714, ¶ 37 ("The State did differentiate the counts at trial, which satisfies the due process concerns in accordance with *Valentine*"); *State v. Cunningham*, 8th Dist. Cuyahoga No. 89043, 2008-Ohio-803, ¶ 38 ("This case is not like *Valentine* because the State did present evidence at trial to differentiate each of the five counts for which

defendant was convicted"); *State v. Rice*, 8th Dist. Cuyahoga No. 82547, 2005-Ohio-3393, ¶ 23 ("the cure for such identical indictments would be for the prosecution to delineate the factual bases for each [count] either before or during the trial").

In this case, there were only two counts of rape. The State presented evidence at trial to support both counts. Barbara Campbell with the Cuyahoga County Coroner's Office testified that, "I found sperm in the mouth, not in the stomach, and I found it in the vagina." She concluded: "There had been oral intercourse and vaginal intercourse. In that way it is repeated." This constituted two distinct acts of rape. "In Ohio, either vaginal intercourse or fellatio constitutes separate sexual conduct, each punishable as rape under R.C. 2907.01(A)." *State v. Barnes*, 68 Ohio St.2d 13, 14, 427 N.E.2d 517 (1981).

The trial court instructed the jury that "sexual conduct" under the rape statute "means vaginal intercourse between a male and female and fellation between persons regardless of their sex." The trial court separately defined both "vaginal intercourse" and "fellatio" in its closing instructions. It was obvious to the jury then, to all of the parties throughout the 30-year history of this case, and to every appellate court to have heard this case, that one count of rape referred to the vaginal rape and one count referred to the oral rape. The trial court's decision to acquit Apanovitch of one count of vaginal rape should have left only one rape count remaining – the oral rape.

This was not a case in which the State indicted 40 carbon copy counts that could neither be delineated nor kept straight by anyone. The jury had before it two counts of rape based on evidence that supported two acts of rape. If one count fell, one count remained. Even the Sixth Circuit in *Valentine* itself noted that "[h]ad this case been tried in two counts, the convictions would clearly stand." *Valentine*, at 637. It should have stood in

this case. *Valentine* "held that any constitutional error was harmless with respect to single convictions." *Fears v. Miller*, N.D. Ohio No. 1:09cv698, 2009 U.S. Dist. LEXIS 126326, *27 (Dec. 1, 2009). To justify dismissing it, the Eighth District contorted its own prior precedents to simultaneously adopt a part of *Valentine* and to reject another part of it.

2. No double jeopardy violation occurs in a retrial where the trial court is able to discern whether there had been a previous finding of not guilty as to the alleged act.

In the court of appeals, Apanovitch essentially conceded that the indictment was not defective ("the potential constitutional violation was not inherent in the indictment itself"). Appellee's Brief, p. 34. Apanovitch instead argued that there was a kind of hidden double jeopardy issue inherent in the indictment that only became live once the trial court acquitted Apanovitch of the vaginal rape. The Eighth District accepted this argument, but by doing so, contradicted and reversed several of its own prior decisions in the area of double jeopardy, leaving trial courts in Cuyahoga County muddled in confusion.

The Eighth District relied upon its own decision in *State v. Ogle*, 8th Dist. Cuyahoga No. 87695, 2007-Ohio-5066. In *Ogle*, the State indicted the defendant on three carbon-copy counts of rape with no differentiation between them. The victim testified that Ogle digitally penetrated her twice and orally raped her once. This was sufficient to delineate the factual basis for each count under *Valentine*. The problem in *Ogle* was that the jury found the defendant not guilty of two counts of rape and hung on the third, resulting in a mistrial solely on that count. On appeal, there was no way for the appellate court to know on which of the three alleged acts the State could retry Ogle.

Ogle established the following test: retrial on the remaining count is permissible only where "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." *Id.*, ¶ 23. A retrial on the remaining count would violate double jeopardy because it might allow the State to retry Ogle for an act of which the jury had already acquitted him.

The Eighth District again relied upon this test a few years later in *State v. Wilson*, 8th Dist. Cuyahoga No. 93772, 2010-Ohio-6015. Like Ogle, the defendant in Wilson was acquitted of two out of three carbon-copy counts of rape. But unlike Ogle, the jury found Wilson guilty on the third count. The court held, "[t]here was no double jeopardy. The only way a double jeopardy issue will arise is if appellant's conviction on count three is reversed and the state wishes to retry him." *Id.*, ¶ 17. In that event, under *Ogle*, the trial court on remand would not know for which of the three alleged acts Wilson could be retried.

That problem did not exist in this case. If the court had applied its own test in *Ogle*, there would have been no *Valentine* issue at all because the alleged acts were not in question. Whereas the juries in *Ogle* and *Wilson* did not fill out interrogatories outlining the basis for their decision on each count, the trial court in this case issued a written opinion stating that it was acquitting Apanovitch of the vaginal rape only. The conviction on the oral rape remained. The factual basis for Apanovitch's conviction was not in dispute and there was thus no possibility that he would face a second prosecution for that offense.

The trial court and the court of appeals seemed to believe that the issue was that they did not know whether the oral rape was reflected in count 3 or count 4 of the indictment. The lower courts then elevated this difference in numbering to a constitutional violation that they found violated Apanovitch's double jeopardy rights and dismissed the second count altogether. But neither *Valentine*, *Ogle*, nor *Wilson* say anything about the numbering of counts. They concern the underlying factual allegations. It makes no

difference whether the remaining count of rape is numbered "3" or "4." Apanovitch could not possibly have been prejudiced by that difference. This is why the Sixth Circuit held in *Valentine* that identically-worded counts in an indictment are permissible as long as the State "delineate[s] the factual basis for the * * * separate incidents either before or during the trial." *Valentine*, at 634.

The Eighth District's decision cuts off this second part of *Valentine* and instead requires that the counts be delineated in the indictment. The court held that the Fifth Amendment "requires enough specificity of facts **in an indictment** to prevent a re-indictment or retrial on charges that have already been decided by a trier of fact." *Apanovitch*, ¶ 58 (emphasis added). This overrules the part of the *Valentine* decision that allows the prosecution to delineate the factual basis for the separate counts during the trial.

Under this holding, every indictment in Ohio that contains identically-worded counts – regardless of what evidence is presented at trial – would now be per se, structural error. This would mandate appellate reversals in hundreds if not thousands of cases statewide in which grand juries return indictments containing two or three counts of similar conduct occurring on the same date that are identically worded. This Court has refused to open that floodgate before. "In a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment * * * structural-error analysis would not be appropriate." *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, ¶ 7. By opening it in this case, the court of appeals has once again "sent a message of chaos and confusion to all common pleas court judges in Cuyahoga County that is truly troubling." *State v. Amos*, 140 Ohio St.3d 238, 2014-Ohio-3160, 17 N.E.3d 528, ¶ 8.

3. Valentine is not binding in Ohio and this Court should reject its application in this state.

As the court of appeals acknowledged, the notice section of *Valentine* is "not binding" on Ohio courts because it is based on the right to a grand jury presentation in the Fifth Amendment of the United States Constitution. *Apanovitch*, ¶ 57; *Valentine* at 631 ("an indictment is only sufficient if it * * * gives the defendant adequate notice of the charges"). The Fifth Amendment right to a grand jury, however, "is not applicable to the states and is not incorporated by the Fourteenth Amendment." *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 19, citing *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). Instead, the right to a grand jury in Ohio is found in the Ohio Constitution, Article I, Section 10: "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury[.]"

This is an area where Ohio is not bound by federal case law. "[E]ven if a state adopts a grand jury system, federal constitutional requirements, binding in federal criminal cases are not binding on the states[.]" *Watson v. Jago*, 558 F.2d 330, 337 (6th Cir.1977). Ohio is free to decide for itself what the protections of its constitutional right to a grand jury mean. Ohio's appellate courts, exercising that freedom, have repeatedly rejected the logic and holding of *Valentine*. *See State v. Adams*, 7th Dist. Mahoning No. 13 MA 130, 2014-Ohio-5854, ¶ 36 (*Valentine* is not good law and we need not follow it"); *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, ¶ 11 (*"Valentine* has no binding effect on Ohio courts. It has been criticized for applying law that does not apply to Ohio grand juries, misapplying and misrepresenting case authority, and being 'distinguished in every subsequent Sixth Circuit decision that cites it on this issue'"); *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 34 ("The factors weighing against the persuasive value of *Valentine*, however, are overwhelming").

This Court has never once cited *Valentine* in ten years since it was decided, and there is thus very little guidance under Ohio law as to whether and to what extent it is binding. What little guidance there was, the Eighth District overturned in this case. This appeal thus presents this Court with the opportunity to clarify the status of *Valentine* in Ohio courts. This Court should do so and hold that *Valentine* is no longer valid precedent.

"[T]he United States Supreme Court has invalidated the reasoning behind one of the major grounds for the *Valentine* decision * * *." *Lawwill v. Pineda*, N.D.Ohio. No. 1:08 CV 2840, 2011 WL 1882456, *5 (May 17, 2011), citing *Renico v. Lett*, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010). In *Renico*, the Supreme Court held that federal appellate court decisions cannot be considered "clearly established" federal law under the Anti-Terrorism and Effective Death Penalty Act (AEDPA). *Lawwill*, at *2. The Sixth Circuit in *Valentine* relied upon other federal appellate court decisions to hold that federal law "clearly established" that the same due process requirements regarding the sufficiency of an indictment set forth in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), should also be applied to state criminal charges. *Valentine*, at 632.

The Supreme Court's decision to invalidate that reliance in *Renico* means that the basis behind *Valentine's* holding is null and void. "The Sixth Circuit has not relied on or even cited its own holding in *Valentine* since *Renico* was decided. In fact, this Court could only find three Sixth Circuit cases citing *Valentine* prior to the *Renico* decision, and the *Valentine* holding was followed in only one." *Lawwill*, at *2. The Sixth Circuit itself has acknowledged that *Valentine* is on tenuous footing. *See Coles v. Smith*, 577 Fed.Appx. 502, 508 (6th Cir.2014) ("we doubt our own authority to rely on our own prior decision – *Valentine* – to independent authorize habeas relief under AEDPA").

The State therefore respectfully asks this Court to accept discretionary jurisdiction over the State's fourth proposition of law and hold that the existence of multiple, identical counts in an indictment does not violate a defendant's protections against double jeopardy where the evidence at trial delineates a separate factual basis for each count. In the alternative, this Court should hold that Ohio courts are not bound by *Valentine* at all.

CONCLUSION

The State respectfully submits that Supreme Court Review is necessary to address (1) whether factual findings made in federal habeas court are binding on state courts, (2) whether a postconviction petitioner can prove his actual innocence by relying solely on a DNA result excluding the petitioner without first establishing a link between that evidence and the murder, (3) whether an issue of a defective indictment can be raised in a postconviction proceeding, and (4) whether the State violates a defendant's double jeopardy rights by including two identically-worded counts in an indictment that the State delineates at trial. The State therefore submits that this case is worthy of Supreme Court review and asks this Honorable Court to accept jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was served by email this 20th day of June, 2016 to Mark R. DeVan (mdevan@bgmdlaw.com), William C. Livingston (wlivingston@bgmdlaw.com), Harry P. Cohen (hcohen@crowell.com), James Stronski (jstronski@crowell.com), Michael K. Robles (mrobles@crowell.com), and Elizabeth Figueira (efigueira@crowell.com), counsel for Defendant-Appellee Anthony Apanovitch.

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Court of Appeals of Ohio

MAY 05 2016

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 102618 and 102698

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ANTHONY APANOVITCH

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

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

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

RELEASED AND JOURNALIZED: May 5, 2016

CR84194156-ZA 94003498

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

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

Factual Background and Procedural History

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

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

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

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

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

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

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

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

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

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

45-75 years in prison.

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

1984 Autopsy

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

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

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

Amended Trace Analyst Report

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

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

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

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[3] *State v. Apanovitch*, 8th Dist. Cuyahoga No. 49772, 1986 Ohio App. LEXIS 8046 (Aug. 28, 1986).

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

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

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

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

Id. at 31.

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

hands." *Id.* at 439.

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

Autopsy Swabs

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

Testing after the Previously Believed Lost Evidence was Discovered

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

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

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

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

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

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

Dr. Edward Blake of FSA

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

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

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

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

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

Dr. Staub

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

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

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

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

Dr. Benzinger

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

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

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

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

> I. The trial court abused its discretion by finding that Apanovitch proved by clear and convincing evidence his actual innocence of the vaginal rape.
>
> II. The trial court abused its discretion by refusing to consider the FSA reports confirming Apanovitch's sperm was present in Flynn's mouth.
>
> III. The trial court erred by ambushing the State with a new and unbriefed issue in its opinion that it never gave the parties an opportunity to address.
>
> IV. The trial court erred by finding a *Valentine* error where there were only two counts of rape in the indictment and the evidence at trial delineated a separate factual basis for each count.

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

Law and Analysis

Standard of Review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at ¶ 29.

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

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

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

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

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

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

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

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

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

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

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

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

***Valentine* Issue**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statements made the distinction.

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

Bond

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

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

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

---

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

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

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

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

Conclusion

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

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

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

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

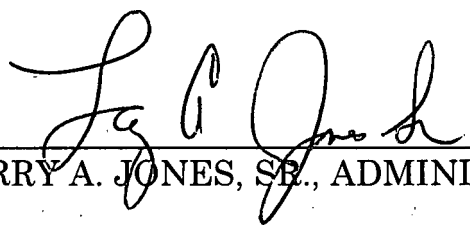
{¶71} Judgment affirmed; case remanded to the trial court for further proceedings consistent with this opinion.

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

The court finds there were reasonable grounds for this appeal.

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

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



LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

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

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

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

I. Findings of Fact

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

11. The case was appealed to the Ohio Supreme Court which affirmed the verdict in a 4-3 decision.

12. Petitioner in June 1988 filed a petition to vacate or set aside the judgment before Judge Carl Character alleging multiple "causes of action" in support of the petition.

13. Judge Character dismissed the petition on April 7, 1989.

14. In February, 1994, Petitioner filed "First Successor Petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Sections 2953.21 and 2953.23(A)," containing additional arguments and bases in support of the petition.

15. On March 13, 1995, Judge Character dismissed the second petition.

16. On August 22, 1995, Petitioner filed the "Second Successor Petition to vacate or set aside judgment and/or sentence pursuant to Ohio Revised Code Sections 2953.21 and 2953.23(A)" raising additional arguments in support of the petition.

17. Judge Character on November 27, 1995 dismissed the third petition.

18. There have been 9 reported cases involving this case and this Petitioner:

    a. *State v. Apanovitch* (8/28/86) 1986 Ohio App. LEXIS 8046 (initial appeal, verdict affirmed)

    b. *State v. Apanovitch* (10/7/87) 33 Ohio St. 3d 19 (appeal of conviction, affirmed)

    c. *State v. Apanovitch* (2/11/91) 70 Ohio App. 3d 758 (appeal of 1st petition for post-conviction relief, dismissal affirmed)

    d. *State v. Apanovitch* (11/9/95) 107 Ohio App. 3d 82 (appeal of 2nd petition for post-conviction relief, dismissal affirmed)

    e. *State v. Apanovitch* (8/8/96) 113 Ohio app. 3d 591 (appeal of 3rd petition for post-conviction relief, dismissal affirmed)

    f. *Apanovich [sic] v. Taft* (7/21/06) 2006 U.S. Dist. LEXIS 54607 (42 U.S.C. 1983 action, dismissed)

    g. *Apanovitch v. Houk, Warden* (10/19/06) 466 F. 3d 460 (appeal of denial of habeas corpus, remand to Dist. Ct. on issue of DNA)

h. *Apanovitch v. Houk, Warden* (8/14/09) 2009 U.S. Dist. LEXIS 103985 (DNA chain of custody); and

i. *Apanovitch v. Bobby, Warden* (6/8/11) 684 F. 3d 434 (affirmed denial of habeas corpus).

19. Petitioner filed his fourth post-conviction relief petition March 21, 2012, seeking relief under R.C. 2953.23 and 2953.21 based upon the DNA evidence which could be considered as a result of the ruling by Federal District Judge Adams, ruling that the chain of custody was sufficiently proven and the DNA containing materials could be tested.

20. The parties stipulated that the Court will consider the relief requested under both the Revised Code sections and Rule 33 of the Ohio Rules of Criminal Procedure.

21. A hearing was held commencing October 14, 2014, predominantly on the issues surrounding the DNA findings, or lack thereof, on the material discovered in the Cuyahoga County Medical Examiner's Office in the 1990's.

22. Dr. Richard Staub testified on behalf of the Petitioner. Dr. Elizabeth Benzinger, from BCI, testified on behalf of the State.

23. The only expert opinion provided during the two-day hearing determined that Petitioner is excluded from the vaginal rape of the victim and that there was insufficient material to reach any conclusion whether Petitioner's DNA was contained in the materials recovered from the victim's mouth.

II. Conclusions of Law

1. The Petition is properly before the Court and is ripe for consideration.

2. R.C. 2953.21, 2953.23, and Rule 33 of the Ohio Rules of Criminal Procedure are applicable to this proceeding.

3. The Court is not bound by the principle of the "law of the case" because two exclusions apply to the facts here. The evidence at the hearing is substantially different than at the original trial and the earlier decision is, at least in part, clearly erroneous and would work a manifest injustice.

4. The indictment counts for rape and the jury instructions failed to differentiate the type or nature of the rape alleged and both counts allege two types of rape making it impossible for the trier of fact to make a clear determination of whether and which crime may have occurred.

5. The clear and convincing evidence excluding the Petitioner from the claim of vaginal rape causes a change in the nature and type of evidence a jury would be presented in the case and could have an impact upon the consideration of the other counts and the specifications.

6. Due to the limited scope of these proceedings, the Court, at this time, may not disturb the prior rulings including, but not limited to, the admission of the victim's present sense impressions, the alleged Brady violations, the difference in the statements of Detective Zalar, the testimony concerning "secretors", the testimony concerning the single hair, and the testimony of the jailhouse snitch, Howard Hammon. Those issues would be subject to challenges in a new trial.

7. The rape specification must be removed and dismissed from the first count of Aggravated Murder.

III. Opinion

A. Introduction

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

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

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

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

B. Law and Discussion

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

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

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

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

2. The "law of the case" does not apply

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

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

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

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

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

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

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

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

3. The DNA evidence

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

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

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

4. Indictment deficiency concerning rape

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

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

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

> The defendant is charged with rape. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 23rd day of August, 1984, in Cuyahoga County, Ohio, the defendant engaged in sexual conduct with Mary Anne Flynn who was not the spouse of the defendant, and the defendant purposely compelled Mary Anne Flynn to submit by force or threat of force.
>
> Sexual conduct means vaginal intercourse between a male and female and fellation [sic] between persons regardless of their sex. Vaginal intercourse takes place when the penis is inserted into the vagina. Fellatio means the sexual act committed with the male sex organ and the mouth.
>
> A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant specific intention to have vaginal intercourse and/or fellatio with Mary Anne Flynn. A person acts purposely when it is his specific intention to engage in conduct of that nature. Purpose is the decision of the mind to do an act with the conscious objective of obtaining a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.
>
> The purpose with which a person does an act is determined from the manner in which it is done, the means or weapon used, and all of the facts and circumstances in evidence.
>
> You will determine from the facts and evidence, whether or not the defendant knowingly had the purpose of mind to forcibly have vaginal intercourse and/or fellatio with Mary Anne Flynn.
>
> Force means any violence, compulsion or constraint physically exerted by any means upon or against Mary Anne Flynn.
>
> If you find that the State proved beyond a reasonable doubt all of the essential elements of the crime of rape, your verdict must be guilty.
>
> If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the crime of rape, then your verdict must be not guilty. (Transcript 2260-2262).

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

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

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

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

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

5. New trial

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

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

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

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

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

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

IV. Rulings

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

A. Petitioner is acquitted of one count of rape;

B. The remaining count of rape is dismissed for violating Petitioner's due process rights due to its deficiency in both specificity and differentiation;

C. Petitioner is granted a new trial on the counts of aggravated murder and aggravated burglary with specifications;

D. The rape specification in the aggravated murder count is dismissed;

E. The prior verdict is vacated pursuant to the terms of this ruling;

F. Bond is to be set.

IT IS SO ORDERED.

ROBERT C. MCCLELLAND, JUDGE

DATE: February 12, 2015

SERVICE

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

COURT EXHIBITS

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