Ohio Parole Board
Application for Executive Clemency

1. APPLICANT'S NAME: ANTHONY C. APANOVITCH | ALIAS:

2. **IF Confined:**

INSTITUTION:	INSTITUTION NUMBER:	DATE ADMITTED:
CHILLICOTHE	A182824	

PAROLE/PRC ELIGIBILITY DATE:	EXPIRATION OF DEFINITE SENTENCE:
99849 AT O.S.R. 1976-1980	DEATH

IF PREVIOUSLY INCARCERATED, LIST INSTITUTION NUMBER: DEATH

3. **IF NOT Confined:**

ADDRESS: STREET CITY STATE ZIP

DATE RELEASED ON PAROLE/PRC:	FINAL RELEASE DATE:
OR DATE GRANTED COMMUNITY CONTROL/PROBATION:	DATE COMMUNITY CONTROL/PROBATION COMPLETED:

4.

DATE OF BIRTH:	AGE:	SOCIAL SECURITY NUMBER:
Feb 16, 1955	67	[redacted]

TELEPHONE #:	CELL PHONE #:	EMAIL:
N/A	N/A	N/A

5. TYPE OF CLEMENCY REQUESTED (SELECT ONE): ☒ Pardon ☐ Commutation ☐ Reprieve OR TIME SERVED

6. HAVE YOU APPLIED FOR CLEMENCY IN THE ☐ YES ☑ NO - If yes, when: _____

13. NEED FOR CLEMENCY:

- ☐ EMPLOYMENT OPPORTUNITIES
- ☐ LICENSING/BOARD EXAMS/PUBLIC OFFICE
- ☐ VOLUNTEER OPPORTUNITIES
- ☐ DEPORTATION
- ☐ DISPARATE SENTENCE
- ☐ MEDICAL
- ☑ OTHER: INNOCENT

14. ATTACHMENTS: (LETTERS IN SUPPORT, COURT PAPERS, DIPLOMAS, ETC.) (SEE INSTRUCTIONS)

I HEREBY SWEAR THAT THE INFORMATION CONTAINED IN THIS APPLICATION AND THE ATTACHED DOCUMENTS IS TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE:

Anthony C. Apanovitch — 4.21.22

APPLICANT'S SIGNATURE — DATE

13. NEED FOR CLEMENCY: ADDITIONAL RESPONSE

I. INTRODUCTION

Anthony Charles Apanovitch ("Tony") was wrongfully convicted and sentenced to death for the 1984 rape and murder of Mary Anne Flynn in Cleveland, Ohio. Despite having proven his innocence through exculpatory DNA evidence in 2015 and having been released from custody for just over two-and-a-half years, Tony is once again a prisoner on death row based on two interlocking and compounding injustices.

First, the State of Ohio concealed evidence from Tony, starting at the time of his trial in 1984 and continuing through the State's secret DNA testing in 2000 and 2001 of crime-scene evidence, and the State withheld that evidence even though it proved Tony's innocence.

Second, after Tony was finally able to demonstrate to a postconviction court that the State's secret DNA evidence exculpated him of the rape of Ms. Flynn—and, based on that acquittal, was then released from death row—the Ohio Supreme Court sent Tony back to death row based on a bizarre and patently unfair technicality. In a decision the court itself recognized in a profound understatement could be "unduly formalistic or unfair," it held that Tony could not avail himself of the results of exculpatory DNA evidence because he did not request that the testing be done, as the court ruled was a jurisdictional requirement of Ohio's postconviction DNA-testing statute. But that was only true because the testing had previously been undertaken *secretly* by the State, thus foreclosing any opportunity for Tony to make the request himself. In other words, the fact that the testing was exculpatory did not matter to the court. All the court cared about was the essentially meaningless question of who requested the testing. Because it was not Tony, according to the court he was ineligible to use those results to demonstrate his innocence and was doomed to return to death row for a crime he indisputably did not commit.

Tony remains on death row today. The Ohio Supreme Court's decision directly and irreconcilably contravenes the very purpose of Ohio's post-conviction relief statute – to ensure innocent people are not killed by the State for crimes they did not commit. The court's decision has led to an absurd result: leaving a wrongfully convicted man in prison and on death row.

This absurd result arises from formalistic procedural barriers relating to Tony's Fourth Petition for Post-Conviction Relief (the "Petition"), which he filed in the Cuyahoga County Court of Common Pleas ("Trial Court") on March 21, 2012.[1] The Petition sought relief under Ohio's post-conviction relief statute and independently requested a new trial based on DNA testing secretly conducted by the State in 2000/2001 and only discovered by Tony in 2008 during the course of his federal *habeas corpus* proceeding.[2]

After an evidentiary hearing in 2014, the Trial Court found that the "unequivocal" and "uncontroverted" DNA evidence excluded Tony as the source of the semen found in Ms. Flynn's vagina.[3] Accordingly, the Trial Court correctly acquitted Tony of vaginal rape, dismissed the second carbon-copy rape count on double jeopardy grounds, granted him a new trial on the remaining aggravated murder and aggravated burglary counts, and ordered Tony released on bond.[4]

The State appealed, and the Eighth District Court of Appeals ("Eighth District") unanimously affirmed.[5] The Ohio Supreme Court accepted jurisdiction on three narrow

[1] The Petition is attached as Exhibit 1.

[2] Correspondence to DeVan and Baich from Meyer, dated Dec. 2, 2008, attached as Exhibit 2. This document was appended to the Petition (Exhibit 1 here) filed in the Trial Court as Exhibit 8. The exhibits to the Petition filed with the Trial Court consists of 408 pages, most not relevant to this matter. Counsel for the Applicant will provide the full set of exhibits if requested by the Parole Board.

[3] Findings of Fact, Conclusions of Law, and Opinion on Post-Conviction Relief, at 3 - 004, 006 (Ohio Ct. Com. Pl., Cuyahoga Cnty. dated Feb. 12, 2015) ("2015 Trial Court Op."), attached as Exhibit 3.

[4] *Id.* at 3 - 009.

[5] *State v. Apanovitch*, 2016-Ohio-2831, 64 N.E.3d 429 (8th Dist.) "2016 Eighth Dist. Op."), attached as Exhibit 4.

propositions of law but never reached the merits of the State's appeal.[6] Instead, it ruled on a jurisdictional technicality that Ohio's post-conviction relief statute, R.C. 2953.23, did not provide a remedy in cases where, as here, the DNA testing at issue was conducted at the request of the State rather than at the request of the eligible offender.[7] However, rather than dismiss the Petition in its entirety, the Ohio Supreme Court remanded the case to the Trial Court to determine what, if any, further action should be taken in connection with Tony's request for a new trial under Ohio Rule of Criminal Procedure 33 ("Crim.R. 33").[8]

On remand, the Trial Court held that Tony's request for a new trial was properly before the court and that all procedural prerequisites to the applicability of Crim.R. 33 were satisfied.[9] The Trial Court again acquitted Tony of vaginal rape based on the "unequivocal" and "uncontroverted" DNA evidence establishing that he did not rape Ms. Flynn.[10] Without explanation, however, and despite the fact that the relevant evidentiary record was exactly the same as it was when the Trial Court acquitted Tony in 2015, the Trial Court failed to dismiss the second carbon-copy rape count and denied Tony's motion for new trial.[11]

Tony appealed to the Eighth District, which affirmed the Trial Court's decision on the alternative grounds that he had not satisfied the procedural requirements of Crim.R. 33.[12] Specifically, according to the Eighth District, Tony's motion was defective because he failed to first obtain permission from the Trial Court to file the motion. The Eighth District's decision,

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[6] *State v. Apanovitch,* 155 Ohio St. 3d 358, 2018-Ohio-4744, 121 N.E.3d 351 ("Ohio Supreme Court Op."), attached as Exhibit 5.

[7] *Id.* at ¶¶ 29, 41-42, pp. 5 - 008, 011-012.

[8] *Id.* at ¶¶ 43-44, pp. 5 - 010-011.

[9] Ruling on Motion for New Trial, at 6 – 004-005 (Ohio Ct. Com. Pl., Cuyahoga Cnty. dated July 23, 2019) ("2019 Trial Court Op."), attached as Exhibit 6.

[10] *Id.* at 6-005.

[11] *Id.* at 6 - 005-006. Compare to Exhibit 3 at 3 - 008 ("the Court acquits 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 Petitioner's due process rights.").

[12] *State v. Apanovitch*, 2020-Ohio-4217, ¶ 25 (8th Dist.) ("2020 Eighth Dist. Op."), attached as Exhibit 7.

however, directly conflicted with the Trial Court's express finding that Tony had indeed satisfied all procedural prerequisites to allow the Trial Court to consider his motion under Crim.R. 33. Tony then appealed to the Ohio Supreme Court, which, on November 9, 2021, declined to accept his appeal.

Significantly, during Tony's fourth post-conviction proceeding, the Trial Court found, on two separate occasions, that the exculpatory DNA evidence, which remains uncontroverted and is the only DNA evidence of record in Tony's case, unequivocally excludes him as the source of the semen found in Ms. Flynn's vagina. The State has always maintained that a single perpetrator both raped and killed Ms. Flynn. Accordingly, based on the State's own theory, if Tony did not rape Ms. Flynn, then he could not possibly have killed her. In other words, the Trial Court's exclusion of Tony as the perpetrator of the vaginal rape also excludes him as the perpetrator of any of the crimes for which he was convicted.

These are the precise circumstances under which executive clemency is warranted. As the United States Supreme Court recognized almost 100 years ago, "Executive Clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Ex Parte Grossman*, 267 U.S. 87, 120-121 (1925). The clemency power, the Court observed, "is a check entrusted to the Executive for special cases." *Id*.

This is a special case. Having exhausted his legal remedies in state court and facing execution for a crime he did not commit, Tony is now before the Parole Board of the Ohio Adult Parole Authority ("Board") asking it to recommend that the Ohio Governor grant a pardon or a commutation of his sentences to time served.

II. RELEVANT BACKGROUND

A. Tony's Conviction is Based on Weak, Inconclusive Circumstantial Evidence.

On August 24, 1984, Mary Anne Flynn was found murdered in her home.[13] Within days of the murder, Cleveland police targeted Tony as a potential suspect because he had painted Ms. Flynn's house.[14] Over the next several days, Tony was interviewed several times by numerous police officers and detectives. Each time, Tony categorically denied any involvement in Ms. Flynn's murder. In addition, Tony voluntarily provided hair, saliva, and blood samples, and the police were given and tested several articles of Tony's clothing.[15]

On October 2, 1984, a grand jury returned an indictment for aggravated murder, rape, and burglary. Detective Anthony Zalar called Tony around noon and told him he had been secretly indicted for rape and murder and needed to turn himself in to stand trial. Tony said he would turn himself in later that afternoon and Detective Zalar agreed. Tony arrived at the Cleveland Police Homicide Unit at about 4:20 p.m. and voluntarily surrendered. Only fifty-five days later, on November 26, 1984, the case went to trial.[16]

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

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

- *The perpetrator's blood type*. Seeking to connect Tony to the victim, Barbara Campbell of the Trace Evidence Department (which collected the forensic evidence) testified that based on the body fluid found in the victim's vagina, the perpetrator was from someone who was blood type A, and whose blood type appears in their non-blood body fluids (*i.e.*, the person was A-type "secretor") and that Tony was an A-type secretor.

[13] Exhibit 4, 2016 Eighth Dist. Op. at ¶¶ 2-3, pp. 4 – 003-04.
[14] *Id.* at ¶¶ 4-5, pp. 4 - 004.
[15] *Id.* at ¶ 5, p. 4 - 004.
[16] *Id.* at ¶ 8, p. 4 - 005.

- *Alleged Inculpatory Statement*. Seeking to paint the inference that Tony implicated himself in the murder, Detective Zalar testified that Tony asked for the opportunity to call his mother "when" he was indicted. The comment allegedly "stunned" the Detective, and the State characterized it as "extremely important" and an effective admission of guilt.

- *Scratch on Tony's Face*. Seeking to identify Tony as the killer, the State argued that a scratch on the left side of his face was consistent with that of a scratch from a fingernail.

- *Putative Lack of an Alibi*. The State argued that Tony provided inconsistent stories about his whereabouts on the night of the murder.

- *Means/Access*. A signed agreement to paint a portion of Ms. Flynn's house was found on the kitchen table the day after the murder was discovered, and Tony was familiar with the layout of the house and had spoken with her on the day of the murder.

- *Motive*. Tony may have commented on Ms. Flynn's physical appearance and expressed an interest in her, and Ms. Flynn had told a friend she was fearful of a "painter."

Significantly, the first two pieces of this "evidence" were the subject of the State's concealment of critical information at trial.

First, the State relied at trial on testimony from Ms. Campbell that fluid found in Ms. Flynn's vagina was from an A-type secretor and on evidence that Tony is also an A-type secretor. By doing so, the State sought to physically link Tony to the crime by establishing him as the source of the fluids found in Ms. Flynn's vagina, and therefore he was her killer.[17]

That argument, it turned out, was knowingly false and was also premised on misconduct by the State. In fact, as the State knew, but failed to disclose to the defense at or before trial, Ms. Flynn herself was an "A" secretor. This explained the fluids taken from her vagina.[18] As Justice

[17] Trial Tr. (State's Opening Statement) ("The evidence would show that the sperm within the body of Maryann Flynn was a Type A derivative. The evidence will show that Anthony Apanovitch's sperm is Type A derivative which is characteristic in 40 percent of all human beings") attached as Exhibit 8, at 8 - 003. The Trial Transcript consists of 2,542 pages. Relevant pages are appended. Counsel for the Applicant will provide the Trial Transcript if requested by the Parole Board

[18] Cuyahoga County Coroner Lab Notes, M51883, Aug 25, 1984, at 9 - 006 attached as Exhibit 9.

Herbert Brown later astutely observed in the direct appeal to the Ohio Supreme Court,[19] if Ms. Flynn was an "A" secretor, recovery of a type A antigen from her body offers no information whatsoever concerning the blood type of the assailant. This was enough of a concern for Justice Brown that he noted there was "a substantial possibility" that Tony "may not be guilty."[20] The State knew that to be true, but instead presented the jury with false and incomplete information.

It was not until after Justice Brown's comments that the State and Ms. Campbell admitted the omission and amended the file to reference the fact that Ms. Flynn was a secretor.[21] That was too late for Tony. The jury was misled to believe that there was physical evidence connecting Tony and Ms. Flynn, but, as it turned out, the truth was, and the State knew at the time, there was simply no legitimate basis for that argument, as Tony's "A" secretor status was an evidentiary nullity.

Second, the State presented the demonstrably false testimony from Detective Zalar regarding a distorted and inaccurate statement falsely attributed to Tony. Detective Zalar testified to the jury that he received a telephone call from Tony, and that, during that call, Tony allegedly asked for the opportunity to call his mother in advance of "***when*** I am indicted."[22] Detective Zalar testified that he found the statement to be "stunning," and the State characterized it as "extremely important," arguing that Tony, by conceding that he was going to be indicted, had effectively admitted that he was guilty of the crime.[23]

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[19] *State v. Apanovitch*, 33 Ohio St. 3d 19, 30 (1987) (Brown, J. concurring and dissenting) ("[i]f the victim was a secretor, the recovery of a type A antigen from the swab obtained from the victim (who was herself a type A) offers no information concerning the blood type of the assailant, because the recovered antigens could have as easily originated from the victim as from the assailant") (emphasis in original), attached as Exhibit 10 at 10 - 012.

[20] *Id.*

[21] Affidavit by Barbara Campbell, dated May 20, 1988 at 11 - 001 ¶4; 11 - 004 (with the word "secretor" typed in after the fact), attached as Exhibit 11.

[22] Exhibit 8, Trial Tr. (Det. Zalar) at 8 - 017.

[23] *Id.* at 8 - 028 (State Closing) ("And, then, remember Officer Zalar's testimony? So extremely important. He says, 'Call me when they indict me.' He was stunned.").

In truth, however, as reflected in the contemporaneous documentary record (again, withheld from the defense and flatly misrepresented by the State), Tony's actual statement was entirely different. What Tony *actually* said – which the jury never got to hear – was that during the call with Detective Zalar, Tony "again stated that he was not responsible for this crime," and that "[h]e did request that ***if*** he was arrested or indicted in connection with this crime, that he be contacted first."[24] Significantly, Tony's actual words – the truth – were never heard by the jury because of the State's misconduct or incompetence. In fact, when the defense challenged Detective Zalar's testimony on cross-examination, the court instructed the detective to review his notes to determine whether there was any record of Tony's alleged statement. Despite the fact that the police file contained a record of Detective Zalar's conversation with Tony -- and that record flatly contradicted the detective's trial testimony -- the State represented to the court, falsely, that a record of the conversation was "not in the report" prepared by Detective Zalar.[25]

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

Additionally, the trial included "evidence" of a hair found on the victim, information about which the State withheld from Tony at trial, and about which the State misled the jury. Ms. Flynn was discovered lying face down on a mattress with her hands bound behind her back.[26] At trial,

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[24] Cleveland Police Department Supplementary Report Aug 25 - Sept. 5, 1984, at 12 – 011 (emphasis added), attached as Exhibit 12.

[25] Exhibit 8, Trial Tr. (Det. Zalar Cross) at 8 – 017-019.

[26] Exhibit 10, at 10 - 003.

the State claimed that the hair was found "in the area of her hand"[27] and dismissed the hair as irrelevant, arguing to the jury that it could have fallen innocently onto Ms. Flynn's body from the head of one of the police personnel or others who had handled or transported her body to the morgue. However, as Tony later discovered, the State failed to disclose to the defense that, as reflected in the withheld contemporaneous notes prepared by the forensic technician who processed the crime-scene evidence, the hair was not merely found "in the area of [the victim's] hand," but, rather, was found "*under [Ms. Flynn's] bound hands.*"[28] That undisclosed evidence would have rendered implausible the State's blatantly misleading attempt to undermine the significance of the hair found on the victim's body. At a minimum, the hair certainly was not evidence the jury could or should have simply ignored; in truth, it would have raised very serious questions with the jury regarding whether someone other than Tony was in fact the actual killer. Trial counsel could have pointed out this fact and argued to the jury that the hair belonged to the person who actually committed the murder.

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

- Ms. Flynn gave her house keys to a pregnant woman who needed a place to stay, and that woman's boyfriend was known to use the basement window to get in and out of the house;[29]
- Ms. Flynn gave her house keys to an exterminator who had "worried her";[30]
- An individual walking in the area the day of the murder looked "confused," "bizarre," and "high on drugs";[31]

[27] Exhibit. 8, Trial Tr. at 8 – 006.
[28] Exhibit. 9, at 9 - 009 (emphasis added).
[29] Exhibit 12, at 12 - 001.
[30] *Id.* at 12 – 008-009.
[31] *Id.* at 12 - 007.

- Ms. Flynn and a friend ran personal ads in a local magazine, hosted "wine and cheese" parties at Ms. Flynn's home, and received "strange calls" as a result;[32]

- A former tenant of Ms. Flynn's was the victim of an attempted rape while living in Ms. Flynn's duplex;[33]

- Neighbors told police that a local family notorious for burglaries was likely involved;[34] and

- Although the State's theory was that Tony exited Ms. Flynn's home through the basement window, the jury was never told that, on the night of Ms. Flynn's murder, there was an attempted break-in through a basement window across the street from Ms. Flynn's home.[35]

In sum, the evidentiary record on which Tony was convicted has been severely diminished over the years. As detailed above, several key pieces of evidence on which the State heavily relied have been rebutted as illusory, untrue, or misrepresented, and have therefore effectively been erased from the record. Unfortunately, however, the truth about this so-called evidence only came to light years later, after it had already been improperly used to convict Tony and sentence him to death. With the inaccurate or false evidence washed away, the remaining evidence is as follows:

- Undisputed DNA evidence that excludes Tony as the source of the semen found in Ms. Flynn's vagina at the autopsy.[36]

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[32] *Id.* at 12 - 006 & 009.

[33] *Id.* at 12 - 010.

[34] *Id.* at 12 - 004.

[35] *Id.* at 12 – 002-003.

[36] Exhibit. 3, 2015 Trial Court Op. at 3 – 003-004, 006; Exhibit 6, 2019 Trial Court Op. at 6 - 005. After the fourth-post conviction proceedings concluded and Tony's convictions were vacated, the State attempted to rely on reports of DNA testing purportedly conducted by Dr. Edward T. Blake of Forensic Science Associates ("FSA"). It is undisputed, however, that those FSA reports were never admitted into evidence in any evidentiary hearing and were never subject to any factual or evidentiary scrutiny. In fact, neither Dr. Blake nor anyone else with personal knowledge has ever authenticated those reports or testified under oath as to the truth or accuracy of their content. No one with personal knowledge has ever been subjected to cross-examination regarding the procedures or methodologies supposedly used in the FSA testing or whether they comport with established scientific and forensic principles. The preparation and calibration of the equipment allegedly used to test the slides has never been disclosed or been subject to testing or evaluation. No log or laboratory notes from Dr. Blake or FSA – critical for any scientific testing – have never been made available to explain and document the testing process or the handling of samples. In short, those FSA reports are simply not "evidence."

Those reports were never sponsored nor authenticated, contain hearsay, and most importantly, are documents that the State expressly stipulated and agreed (as confirmed in a trial court order) were excluded. The State informed the trial court that it would not seek to present testimony from Dr. Blake or rely upon the FSA reports, and based on that representation, the trial court concluded: "It's my position that Blake's out and I'm not going to allow him to testify." Telephonic Conference Transcript, July 31, 2014, at 13 – 006-007, attached as Exhibit 13.

- No physical evidence whatsoever linking Tony to the crimes: no blood, no saliva, no hair, no sweat, no semen, no fingerprints, and no footprints.[37]

- A hair found "on victims back under her bound hands" that does not belong to the victim or Tony and, thus, at least arguably, must have come from the actual perpetrator.[38]

- Evidence of several other, and arguably more likely, potential perpetrators.

- The scratch on Tony's face, considered in the context of the testimony of the medical examiner (Dr. Balraj) that (a) glass or a knife also could have caused the scratch, and (b) no bodily tissue was found beneath Ms. Flynn's fingernails.[39]

- Tony's explanations of his whereabouts the night of the crime, which the State characterized as inconsistent, but which, based on a careful review of the record of his interviews with the police, are actually largely consistent.[40] Indeed, Tony consistently reported that he started the evening at Pinky's bar.[41] He reported that he left Pinky's bar for Comet bar just before the football game, or about 9:00 PM, and that minor variation was perhaps due to the start of the Thursday night preseason football game – which started at 7:00 PM instead of 9:00 PM like a typical Monday night football game. In any event, the Detectives all report that Tony indicated he returned to Pinky's from the Comet bar until it closed, and then went to Brookside bar until it closed, and then to Escape Lounge until it closed.

- Tony was familiar with Ms. Flynn and her house, having been hired to paint a portion of the house.

- Tony may have commented on Ms. Flynn's looks and expressed an interest in her, and Ms. Flynn told a friend that she was fearful of an unnamed "painter."

When the relevant evidence is considered together (without consideration of the bogus, now discredited evidence detailed above on which the State strongly relied at trial), the outcome

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[37] Exhibit 8, Trial Tr. (Det. Simone) at 8 - 009; Exhibit 8, Trial Tr. (Campbell) at 8 - 007.

[38] Exhibit 8, Trial Tr. (B. Campbell) at 8 - 008; Ex. 9 at 9 - 006.

[39] Exhibit 8, Trial Tr. (Dr. Balraj) at 8 - 004 & 005.

[40] *Compare* Interviews of Tony by Cleveland Police dated Aug. 28-30, 1984, attached as Exhibit 14 with (Exhibit 8, Trial Tr. (Det. Adrine) at 8 – 020-024; *id.* (Det. Reese) at 9 – 025-026 (Det. Zalar) at 8 – 013-016; (Det. Bornfield) at 8 -027 (Det. Simone) at 8 - 010 & 012.

[41] *Id.*

is undeniable: Tony could not have committed the crimes for which he was convicted. Yet, despite the conclusive evidence establishing his innocence, Tony sits on death row awaiting his execution.

In subsequent decades after his conviction, Tony filed all appropriate appeals, a petition for writ of *habeas corpus* in the federal court, and four post-conviction relief petitions in the state court, all of which were denied.

B. The State's Secret Testing of DNA Evidence It Previously Asserted Was Lost or Destroyed.

In 1989, approximately five years after Tony was sentenced to death, he began asking for DNA analysis of the biological evidence that had been collected from Ms. Flynn at her autopsy. In response, the State claimed that the evidence had either been lost or destroyed.[42] In or around 1991, however, the Cuyahoga County Medical Examiner's Office ("CCMEO") (then the Cuyahoga County Coroner's Office) discovered three slides in the Trace Evidence Department that contained biological material taken from Ms. Flynn's mouth and vagina during her autopsy in 1984.[43]

In 2000 and 2001, the CCMEO undertook secret DNA testing of those slides, as well as additional slides that had been stored in the Pathology department. Specifically, the testing was conducted on six samples prepared from slides containing biological material taken from Ms. Flynn during her autopsy.[44] The medical examiner, Dr. Balraj of the CCMEO, took swabs at the autopsy from Ms. Flynn's oral, vaginal, and rectal cavities.[45] Spermatozoa were identified in the

[42] Exhibit 4, 2016 Eighth Dist. Op. at ¶ 17, p. 4 - 009.

[43] *Id.*

[44] Report of Autopsy, No. 190729 Aug. 25, 1984, at 15 - 001, 005, attached as Exhibit 15; Evidentiary Hearing Tr. (I) at 16 - 005:5-21 (Staub Direct) & (III) at 16 - 040:8-13 (Benzinger Direct) attached as Exhibit 16. References to the "Evidentiary Hearing Tr." are to the transcript of the October 14-15, 2014 hearing. The Transcript consists of 267 pages. Relevant pages are appended. Counsel for the Applicant will provide the entire Transcript if requested by the Parole Board. The transcripts are designated as follows: "(I)" refers to the October 14, 2014, Morning Session; "(II)" refers to the October 14, 2014, Afternoon Session; and "(III)" refers to the October 15, 2014, Morning Session

[45] Exhibit 15 at 15 – 002-004.

samples taken from the oral and vaginal cavities, but no spermatozoa were identified in the rectal samples.[46] Accordingly, the CCMEO later performed DNA testing only on samples taken from Ms. Flynn's oral and vaginal cavities.[47] The swabs generated by Dr. Balraj during the autopsy were used to create two sets of slides: Trace Evidence slides and Pathology slides. The samples taken from the Trace Evidence slides were labeled as Item 1.1 (swab of vaginal smear), Item 1.2 (scrapings of vaginal smear slide), and Item 2.1 (swab of oral smear slide). The CCMEO tested these slides in late 2000.[48] The Pathology slides were labeled Item 3.1 (scrapings of vaginal smear slide), Item 5 (swab of oral smear slide), and Item 6.1 (scrapings of oral smear slide).[49] The Pathology slides were tested by the CCMEO in 2001.[50]

Despite active post-conviction litigation between the parties, the State failed to disclose to Tony's defense either that the CCMEO tested those two sets of slides or the results of that testing. Tony learned of that testing and its results in 2008, and then only because that information was produced by the State during federal *habeas corpus* proceedings.[51]

C. Tony's Pursued a Fourth Petition for Post-Conviction Relief and Request for New Trial Based on the Newly Discovered Exculpatory DNA Evidence.

On March 21, 2012, two days after his federal proceedings came to an end, Tony filed the Fourth Post-Conviction Petition based on the DNA testing secretly conducted by the CCMEO in 2000 and 2001. The Petition sought relief pursuant to R.C. 2953.23, Ohio's post-conviction relief statute, and also independently requested a "new trial."[52] On October 14 and 15, 2014, the Trial

[46] *Id.*
[47] Cuyahoga County Corner Laboratory Notes 2000-2001 at 17 – 001-011, attached as Exhibit 17.
[48] *Id.* at 17 – 004, 012; Correspondence to Prosecutor from Coroner, undated at CCMEO00000029, attached as Exhibit 18.
[49] Exhibit 17 at 17 – 002-003; Exhibit 16 Evidentiary Hearing Tr. (I) at 16 - 005:5-21 (Staub direct).
[50] Exhibit 17 at 17 – 001-008.
[51] Exhibit 4, 2016 Eighth Dist. Op. at ¶ 18, p. 4 - 009.
[52] Exhibit 1, Petition at 1 - 030.

Court held an evidentiary hearing, at which it heard testimony from two experts: Dr. Rick Staub for Tony and Dr. Elizabeth Benzinger for the State.[53]

At the time the DNA evidence was tested in 2000 and 2001, the CCMEO concluded that only one of the six slides tested, Item 1.2, yielded sufficient data from which relevant conclusions could be drawn.[54] Dr. Staub agreed with, and Dr. Benzinger did not dispute, the CCMEO's conclusion.[55] Significantly, both Dr. Staub and Dr. Benzinger also agreed that Tony is ***excluded*** as the source of the DNA from Item 1.2, a slide that contains sperm taken from Ms. Flynn's vagina. At the October 2014 hearing, Dr. Staub explained in detail the methodology used by the CCMEO to test the slide, and how he interpreted the results, explaining his analysis and the conclusion (without caveat, qualification, or reservation) that the data developed from testing Item 1.2 excludes Tony as the source of sperm taken from Ms. Flynn's vagina at the autopsy.[56] Importantly, the State and Dr. Benzinger did not dispute that conclusion.

After hearing the testimony from Dr. Staub and Dr. Benzinger, and reviewing the parties' "extensive briefing . . . along with the entire transcript of the trial, all exhibits provided by counsel, all of the reported cases . . . and the rulings on the prior post-conviction petitions," the Trial Court, on February 12, 2015, issued the following Findings of Fact and Conclusions of Law:

- "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."[57]

- "The only expert opinion provided during the two-day hearing determined that [Mr. Apanovitch] is excluded from the vaginal rape of the victim and that there was

[53] Exhibit 3, 2015 Trial Court Op. at 3 - 003, 006.

[54] Cuyahoga County Coroner Laboratory Examination Report, #190729 Nov. 11, 2000; Mar 7, 2001, at 19 – 001-002, attached as Exhibit 19.

[55] Exhibit 16, Evidentiary Hearing Tr. (I) at 16 - 003:004-35:17 (Staub direct); *id.* (III) at 16 - 041:8-13 (Benzinger cross).

[56] *Id.* (I) at 16 - 006:11-16 - 009:14; (II) at 16 - 013:20-16 – 036:23 (Staub direct).

[57] Exhibit 3, 2015 Trial Court Op. at 3 - 003.

insufficient material to reach any conclusion whether [Mr. Apanovitch's] DNA was contained in the materials recovered from the victim's mouth."[58]

- "Dr. Staub was the only expert asked his opinion whether the results of the DNA testing of the vaginal slide materials excluded [Mr. Apanovitch]. It was his unequivocal opinion that [Mr. Apanovitch] 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."[59]

- "The clear and convincing evidence excluding [Mr. Apanovitch] 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."[60]

- "As a result of the evidence presented at [the] hearing[,] there has been a material change in the nature of the evidence from what was presented at trial."[61]

Based on this "uncontroverted" and "unequivocal" evidence,[62] the Trial Court acquitted Tony of vaginal rape. Having reached this conclusion, the Trial Court immediately encountered a clear constitutional issue. In 1984, the State failed to specifically charge Tony with separate counts of oral and vaginal rape.[63] The Trial Court was presented with an irremediable problem of the State's own making. Nothing in the trial record (which the Trial Court reviewed in its entirety) indicated which of the two, identically-worded charges was intended to reflect the allegations of vaginal rape.[64] Moreover, even if the Trial Court had chosen one of these counts at random, it would have been a clear violation of the constitutional prohibition on double jeopardy to not dismiss the carbon-copy count containing an allegation of rape by vaginal intercourse – the identical crime for which Tony had just been acquitted. The Trial Court concluded that the only constitutionally acceptable result was to acquit on one count of rape and dismiss the other.[65]

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[58] *Id.*
[59] *Id.* at 3 - 006.
[60] *Id.* at 3 - 004.
[61] *Id.* at 3 - 006.
[62] *Id.*
[63] *Id.* at 3 - 007-008.
[64] *Id.* at 3 - 006-008.
[65] *Id.* at 3 - 008.

Finally, the Trial Court granted Tony a new trial on the remaining counts of aggravated murder and aggravated burglary, stating that "[t]he clear and convincing evidence excluding [Mr. Apanovitch] from the claim of vaginal rape causes a change in the nature and type of evidence a jury would be presented in the case and could have an impact upon the consideration of the other counts and specifications."[66] The Trial Court then ordered that Tony be released on bond with house arrest and electronic monitoring.[67]

D. The State's Appeals and the Ohio Supreme Court's Remand.

Following the Trial Court's decision, the State filed an appeal to the Eighth District, which, on May 5, 2016, rejected every argument put forth by the State and unanimously affirmed the Trial Court's decision in all respects.[68] The following day, Tony was released from custody after serving nearly thirty-two years on death row. Tony moved into the community, got married, and cared for his family.

The Ohio Supreme Court accepted the State's appeal of three narrow propositions of law. It did not reach the merits of the Trial Court's decision (or, for that matter, any of the State's propositions of law), however, instead holding that the Trial Court "lacked subject-matter jurisdiction to adjudicate Apanovitch's postconviction petition brought under R.C. 2953.23."[69] Specifically, despite acknowledging that its decision "may seem unduly formalistic or unfair,"[70] the Ohio Supreme Court held that R.C. 2953.23(A)(2) applies only where the DNA testing at issue was conducted at the eligible offender's request.[71] Since the DNA testing at issue in the Petition

[66] *Id.* at 3 - 004.
[67] Exhibit 3 at 3 - 009; *see also State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry May 6, 2016), attached as Exhibit 20.
[68] Exhibit 4, 2016 Eighth Dist. Op. at ¶ 1, p. 4 - 003.
[69] Exhibit 5, Ohio Supreme Court Op. at ¶ 42, p. 5 - 011.
[70] *Id.* at ¶ 41, p. 5 – 011.
[71] *Id.* at ¶ 29, p. 5 - 008.

was conducted at the State's request, the Ohio Supreme Court held that Tony could not seek relief under R.C. 2953.23.[72]

However, the Ohio Supreme Court acknowledged that the "state joined Apanovitch in stipulating prior to the trial court's hearing in this case that 'Rule 33 of the Ohio Rules of Criminal Procedure appl[ies] to this post-conviction proceeding' and that the trial court 'shall refer to and rely on said rule * * * during its deliberations and judgment.'"[73] Accordingly, rather than simply dismiss the Petition in its entirety, the Ohio Supreme Court instead remanded the matter to the Trial Court to determine what relief, if any, should be afforded Tony under Crim.R. 33.[74] The next day, Tony was taken into custody in his front yard and returned to death row.

E. The Trial Court Denied Tony's Request for a New Trial.

On remand, the Trial Court found that Tony's request for a new trial was properly before the Trial Court and that all procedural prerequisites to the applicability of Crim.R. 33 were satisfied.[75] The Trial Court then found, as it did in 2015, that the newly-discovered DNA evidence excludes Tony as the source of the semen found in Ms. Flynn's vagina.[76] Based on this "uncontroverted" and "unequivocal" evidence, the Trial Court again acquitted Tony of the vaginal rape count.[77] However, without any explanation, and despite the fact that the evidentiary record before the Trial Court was exactly the same as it was in February 2015, the Trial Court inexplicably did not dismiss the "carbon-copy" rape count and concluded that Tony was not entitled to a new trial under Crim.R. 33.[78]

[72] *Id.* at ¶ 42, p. 5 - 011.
[73] *Id.* at ¶ 43, p 5 – 011-012.
[74] *Id.* at ¶ 44, p. 5 - 012.
[75] Exhibit 6, 2019 Trial Court Op. at 6 - 004.
[76] *Id.* at 6 - 005.
[77] *Id.*
[78] *Id.* at 6 – 005-006.

On August 27, 2020, the Eighth District affirmed the Trial Court's decision, but on the alternative ground that Tony had not satisfied the procedural requirements of Crim.R. 33. Specifically, according to the Eighth District, Tony's request for a new trial was defective because he failed to file a motion for leave to file a motion for new trial.[79] The Eighth District rendered that decision despite the facts that the parties expressly stipulated, and the Trial Court ordered, that Crim.R. 33 applied to the proceeding and that on remand, the Trial Court found that Tony's request for a new trial was properly before the Trial Court and that all procedural prerequisites to the applicability of Crim.R. 33 were satisfied.[80]

On November 9, 2021, the Ohio Supreme Court declined to accept Tony's appeal of the Eighth District's decision. Having exhausted his remedies in state court, Tony remains on death row, despite having proven his innocence through exculpatory DNA evidence.

III. CLEMENCY SHOULD BE GRANTED TO TONY BECAUSE HE IS INNOCENT OF THE CRIMES FOR WHICH HE WAS CONVICTED

The weakness of the State's evidence at trial is illustrated by a letter that Ohio Supreme Court Justice Craig Wright wrote to this Board in 1996, nineteen years before a court found Tony was excluded from the rape, and therefore the murder. In the letter, Justice Wright asked that Tony's death sentence be commuted.[81] Although Justice Wright had authored a 1987 opinion affirming Tony's convictions and death sentence, he wrote in 1996 that he had changed his position because of lingering doubts about Tony's trial verdict. Writing that "[t]here is no question that there is some 'residual doubt' in this case," Justice Wright also noted that Tony's trial judge "has

[79] Exhibit 7, 2020 Eighth Dist. Op. at ¶ 25, p. 7 - 014.

[80] Exhibit 3, 2015 Trial Court Op at 3 - 003; Exhibit 5, 2019 Trial Court Op. at 5 - 004.

[81] Correspondence to Margarette Ghee, Chair from Justice Craig Wright, dated Feb. 7, 1996, attached as Exhibit 21.

indicated to me that he came close to granting a Rule 29 motion [acquittal for insufficient evidence of guilt] following the state's case [against Tony]."[82]

Justice Wright's request for a commutation rings more loudly in light of the events that have occurred since he wrote his letter to this Board in 1996. As explained above, on two separate occasions (in 2015 and again in 2019), the Trial Court found that Tony is excluded as the source of the semen found in Ms. Flynn's vagina and acquitted Tony of vaginal rape. Based on the State's sole assailant theory, the exclusion of Tony as the perpetrator of the vaginal rape necessarily excludes him as the perpetrator of any of the crimes for which he was convicted. The newly discovered exculpatory DNA evidence, standing alone, is more than sufficient to warrant clemency in this case. In addition, as explained above and summarized below, several critical pieces of "evidence" on which the State relied at trial were in fact illusory and/or flatly misrepresented by the State:

- The State at trial relied on the fact that Tony has blood type "A" and that he secretes his blood type antigens into his other bodily fluids, including saliva and mucus, to suggest that he must have been the source of fluids in Ms. Flynn's vagina, which also belonged to an "A" secretor. The State, however, failed to disclose to the defense, and misleadingly did not explain to the jury, that Ms. Flynn was also an "A" secretor, meaning that the jury could not possibly have drawn the conclusion that Tony was the perpetrator from the fluid found in Ms. Flynn's vagina.

- The State at trial relied on a detective's testimony that Tony had effectively implicated himself in the crimes by making statements prior to his indictment that the State characterized to the jury as "stunning" and "extremely important." In fact, the detective's testimony was flatly contradicted by a contemporaneous record of Tony's statements contained in the police file, which the State withheld from the defense and then falsely told the trial court did not exist.

- The State at trial made false statements about the location of a hair found on Ms. Flynn's body that did not belong to her or Tony, seeking to discredit the defense's argument that the hair could only have been deposited by the actual perpetrator, someone other than Tony. Once again, the State withheld from the defense contemporaneous notes establishing precisely where the hair had been discovered, which in fact supported and corroborated the defense's theory of the critical

[82] *Id.*

> importance of the location of the hair, specifically, that it could only have been deposited by Ms. Flynn's actual murderer.

In other words, the truth that surfaced after Tony's trial effectively *erased* much of the bogus evidence used to convict him. The remaining "evidence" is even more attenuated, unreliable, and unpersuasive, and, combined with the newly-discovered DNA evidence – that indisputably excludes Tony as the source of the semen found in Ms. Flynn's body – the scale decidedly tips in favor of granting Tony clemency. Indeed, the now-undisputed facts confirm not only that there is not a shred of physical evidence linking Tony to the crime, but that the two pieces of critical physical evidence found at the crime scene (the semen found in Ms. Flynn's vagina and the hair found beneath her hands) did not come from Tony.

As noted above at page 7, Justice Herbert Brown dissented in part from the Ohio Supreme Court's opinion affirming Tony's conviction and death sentence. Justice Brown has since learned that DNA test results were hidden from Tony and "the significant fact is that those results exonerated Mr. Apanovitch from the rape. If that is the case, Mr. Apanovitch should not be on death row; nor should he (based upon the theory of prosecution) be in prison."[83] Justice Brown went on to write to this Board that he "learned other disconcerting information bearing on issues that led me to question Mr. Apanovitch's guilt in 1987[,]"[84] including the secreter status of the victim, the oral statement by Tony that contradicted a detective's testimony, and the location of the unidentified hair that was found on Ms. Flynn's body. He noted the "Ohio Supreme Court decision [in 2018] sent a man back to death row, and effectively narrowed any legal options in the courts for Mr. Apanovitch."[85] Justice Brown recognized that this "Board has the authority, even

[83] Correspondence to Ohio Parle Board from Justice Herbert J. Brown letter, March 11, 2022, at 22 - 002, attached as Exhibit 22.

[84] *Id*.

[85] *Id*.

the duty, to right a wrong and correct an injustice that has now lasted almost 38 years" and urges this Board to "release Mr. Apanovitch from prison."[86]

An entirely new and different narrative now controls. That narrative starts with the newly discovered DNA evidence which excludes Tony as the source of semen found in Ms. Flynn's vagina. That DNA evidence, of course, is consistent with the only other piece of physical evidence, a hair found under the victim's bound hands that does not belong to the victim or Tony and, at least arguably, must have come from the actual killer. The only physical evidence (the hair and semen) conclusively and irrefutably do not belong to Tony. Moreover, there is no physical evidence whatsoever linking Tony to the crimes: no blood, no saliva, no hair, no sweat, no semen, no fingerprints, and no footprints.

Despite the overwhelming evidence establishing his innocence, Tony remains in prison – more than thirty-seven years after his conviction – because the State misplaced and was unable to find critical evidence. Then, the State failed to disclose that the DNA evidence had been discovered and surreptitiously tested, and then hid the DNA test results from the defense for another decade. As explained above, the exculpatory DNA testing came to light only because the State produced it in Tony's federal *habeas corpus* proceeding. That did not occur until 2008, twenty-four years after the crime and almost a decade after the CCMEO conducted the tests. When Tony was finally able to seek relief based on that exculpatory DNA testing, the Trial Court acquitted him of vaginal rape and found that the change in evidence required a new trial on the remaining charges.

The Ohio Supreme Court, however, in a decision that itself recognized as "unduly formalistic or unfair," vacated the Trial Court's ruling based on the technicality that the DNA testing at issue was conducted at the State's request rather than at Tony's request. As an Ohio

[86] *Id*.

Court of Appeals stated, the "ultimate objective" of Ohio's post-conviction relief statute is that "the innocent go free."[87] Given the profound importance of determining whether an innocent person will be exonerated or remain in prison or even put to death, the manner in which the DNA testing is obtained (as long as it complies with applicable scientific standards) should not possibly matter. Precluding a person from successfully establishing his innocence based on who requested the exculpatory DNA testing is beyond absurd and subverts Ohio's public policy of ensuring that innocent individuals do not remain imprisoned.

To make matters worse, on the Ohio Supreme Court's remand, the Eighth District affirmed the denial of Tony's motion for new trial on the sole grounds that, according to the Eighth District, he failed to file a motion for leave to file a motion for new trial.[88] A motion for leave to file a motion is a mechanism designed to allow the court to decide whether to entertain the motion, and to allow the opposing party an opportunity to oppose the motion if it believes the court should not do so. The Eighth District found that procedural step necessary even where, as here, the parties expressly stipulated, and the Trial Court ordered, that Crim.R. 33 applied to the proceeding and that the Trial Court would rely upon Crim.R. 33 during its deliberations and judgment. Again, a court relied on a technicality to avoid the merits of Tony's argument.

In any event, on remand the Trial Court expressly found that Tony's request for a new trial was properly before the court, and that all timing and procedural prerequisites to the applicability of Crim.R. 33 had been satisfied, despite the fact that Tony did not file a motion for leave.[89]

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[87] *State v. Emerick*, 2d Dist. Montgomery No. 24215, 2011-Ohio-5543, ¶ 59 (citation omitted).

[88] Exhibit 7, 2020 Eighth Dist. Op. at ¶ 25, 7 - 014. This conclusion directly and irreconcilably conflicts with the Eighth District's 2016 decision, where on the exact same record, the Eighth District reached the exact opposite conclusion and held that Crim.R. 33 was properly before the Trial Court and that Tony was entitled to a new trial. By affirming the Trial Court's 2015 decision, the Eighth District necessarily determined, correctly, that Tony's Crim.R. 33 motion for new trial was properly before, and considered by, the Trial Court. In its 2020 decision, however, the Eighth District reached the exact opposite conclusion based on the exact same record.

[89] Exhibit 6, 2019 Trial Court Op. at 6 – 004-005.

Specifically, the Trial Court found that it was not until the exhaustion of Tony's federal *habeas* proceedings that he "could procedurally pursue a new trial" based on the newly-discovered DNA evidence and that Tony sought relief under Crim.R. 33 "at his first opportunity procedurally."[90] In other words, the Trial Court agreed that Tony's Petition satisfied the very elements that a motion for leave to file a motion for new trial would have needed to satisfy. With that record in hand, the Eighth District proceeded to issue an egregiously unjust decision that deprived an innocent man of the opportunity for a new trial based on conclusive and uncontroverted exculpatory DNA evidence.

IV. TONY WAS FREE FROM DEATH ROW FOR 2 YEARS, 6 MONTHS AND 23 DAYS

Tony was out of custody for just over two-and-a-half years. He successfully lived in the community during that time, eventually getting married and raising his grandchildren.

Tony's ability to live his life resulted from the trial court's order that he be released on bond with house arrest and electronic monitoring.[91] Tony's ex-wife and her husband, Diane and Ken McSkimming, and Tony's first cousin Kim Braniff, put up property and cash to secure Tony's release. On the evening of May 6, 2016, the day after the Eighth District affirmed the Trial Court, Tony was released from the Cuyahoga County Jail where he was being housed. Waiting for Tony outside the county jail were Diane and Ken, and they drove Tony to their home in Massillon, Ohio. When asked why they took him in, Ken will say, "Justice, it was the right thing to do." Diane will say, "We are friends and we wanted to help him get on his feet."

"Getting on his feet" involved a world of new experiences for Tony, who had been locked away from society for more than 30 years. On the ride from Cleveland to the McSkimming's home, Tony talked on a cellphone for the first time. He looked out the car window to soak up the scenery.

[90] *Id.* at 6 - 004.
[91] Exhibit 20, Journal Entry May 6, 2016.

When Tony arrived at his new home, he could not get out of the car as he did not know how to open the door. (The last time he was in a non-prison vehicle was 1984 when he was dropped off outside the Cleveland Police Department.) That evening, Diane, Ken, and Tony ate cheeseburgers and visited until 3:00am. The next morning when he was in the kitchen stirring his coffee, Tony held the spoon and said it was so heavy. He had been using plastic utensils since 1984.

As Diane and Ken have written to this Board, "After a confusing start [Tony] was able to adjust to a new life with cell phones and real silverware (vs. plastic) and other changes since 1984."[92] They observed, "Tony has always been a family man and would always go to church on Sundays when he lived with us. He has always been helpful, appreciative, thankful and took nothing for granted. Tony would take [Ken's] special needs stepdaughter to Mass on Sundays. . . . While with us, he would cook, wash cars, clean without being asked to! He was never bitter or vindictive."[93]

As Tony adjusted to his new world, he began to broaden his experiences and participate in life as a community member, because the trial court permitted Tony "limited release from home detention . . . with proper notification of the probation department."[94] At the request of Tony's pretrial services officer, Tony was "permitted to wash his friend's family car in their driveway on Wednesday, mow their lawn on Thursdays and attend Mass on Sunday."[95] Tony's experiences "at that time were eye opening to say the least. To experience freedom after being incarcerated for 32 years was very emotional for him and others. He was finally able to visit with friends and family without being shackled. [H]e had several cookouts and visits from his family members from

[92] Correspondence to Ohio Parole Board from Diane and Ken McSkimming letter at 1, March 11, 2022, attached as Exhibit 23.

[93] *Id*. at 23 - 002.

[94] *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry June 13, 2016), attached as Exhibit 24.

[95] *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry Aug. 8, 2016), attached as Exhibit 25.

Indiana and Pennsylvania."[96] Tony's daughter and her children were also frequent visitors, as well as other family members and friends.

Tony also was able to experience in-person aspects of his faith—an important part of his life. First, he was able to connect with Dr. Richard A. Wing, who was then the Senior Minister of First Community Church in Columbus, Ohio. Dr. Wing first became acquainted with Tony in 2013, after he received a letter from Tony asking what hope means to men on death row. He subsequently spoke to and visited Tony regularly.[97]

Tony also contacted Father G. David Weikart, the then-Pastor at St. Joan of Arc Roman Catholic Parish in Canton, Ohio. After taking Tony's call and agreeing to a meeting, Father Weikart "was willing to do so but [he admitted he] was a little apprehensive of meeting with a convicted, former death row, inmate."[98] During the visit, Father Weikart found Tony's "story to be sensational and yet honest."[99] Tony "became a 'regular'" at St. Joan of Arc and Father Weikart "would see Anthony every Sunday thereafter at Mass. We always spoke and he would tell me of the status of his release, the situation of his case, or his future aspirations[.]. . . He would often come to Mass with [Ken's] special needs (step)daughter."[100]

Tony also married Beth Frame—the woman he'd met fifteen years earlier as a result of Beth's experience in college. In 2001, she was studying to become a paralegal; one of her assignments required her to find a case, review it, and write about it. She picked Tony's case. Over time, Beth continued to write to Tony, and they became friends. She would visit him on death row, sometimes with her daughters and granddaughters. Over the nearly fifteen years Beth and Tony

[96] Exhibit 23 at 23 - 001.

[97] Correspondence to Ohio Parole Board from Dr. Richard Wing letter, March 14, 2022, at 26 - 001, attached as Exhibit 26.

[98] Correspondence to Ohio Parole Board from Father G. David Weikart letter, March 10, 2022, at 27 - 001, attached as Exhibit 27.

[99] *Id*.

[100] *Id*. at 27 - 002.

knew each other, they grew closer and became a family. Later, after Tony was released, Beth and her daughters and granddaughters would visit Tony when he was living with Diane and Ken. Tony received permission from the Court to move to Akron, Ohio, to Beth's home.[101] On December 3, 2016, Tony moved in with Beth and her two granddaughters.

On December 17, 2016, Beth and Tony were married. Dr. Wing "officiated the marriage of Beth and Tony and celebrated their new life with Beth's children and grandchildren, Tony's family, and friends."[102] Dr. Wing observed, "For two-and-a-half years Tony was the ideal father and grandfather taking kids to and from school."[103]

Beth worked full-time at the Health Department in Akron. Tony took responsibility for the housework – he cleaned, did the laundry, cooked, and took care of the dogs. He would take his granddaughters to school in the morning and pick them up in the afternoon when he had permission to do so. Tony was allowed access to the entire property – inside and outside of the house, and between 10:00am and 6:00pm on Fridays and Saturdays, he was permitted to leave the property for chores.[104] It was then that Tony would cut grass, paint, repair decks, or rake leaves to earn money to contribute to the family income.

Tony was then able to connect his focus on his family with his focus on his faith. One Friday night Father Weikart joined Tony and his family for a fish dinner. Father Weikart "ate with Anthony, Beth, and their multiple dogs. [He] could see a contentment and true appreciation in Anthony's eyes. Here was a man enjoying the freedoms that most of us take for granted. He smiled and laughed the entire visit."[105] Father Weikart thought to himself, "'here is a man who has finally

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[101] *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry Nov. 23, 2016), attached as Exhibit 28.

[102] Exhibit 26, at 26 - 002.

[103] *Id*.

[104] *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry May 9, 2017), attached as Exhibit 29.

[105] Exhibit 27, at 27 - 002.

found peace with his life after all those years of not knowing.' It made [him] appreciate the freedoms that [he] too may have overlooked for too long."[106] Father Weikart "believed [Tony] to be truthful and honest."[107]

Tony also reconnected with his nieces and nephews, who were young when he was arrested in 1984. His niece, Carrie Michl, recalls that when she was young Tony was "the cool uncle that everyone wished they had. Whenever Tony came to visit, he made sure to spend time with each of his nieces and nephews and all of us would look forward to seeing him. He often took us for rides around the block in his semi-truck and would let us blow his horn!"[108] Carrie recalls that when Tony was arrested, there were hushed and serious tones from the adults, and that her "whole world had been turned upside down."[109] After Tony went to death row, Carrie and a friend would "make copies of articles and mail them to news stations and radio stations and newspapers to try and get his story out."[110] Carrie would "write letters to Tony and he would write me back, often encouraging me to do good in school, or take care of my brother, to not give up."[111]

When Tony was out of custody, Carrie visited with him. "[H]e was every bit like he always was. He couldn't wait to get his driver license again or be able to be with the woman he loved or make up for lost time with my brother and myself."[112] Tony "would take time out to come and help us. One of our neighbors was calling the city inspectors and they cited us for our garage and back porch needing paint. Tony came over and helped us sand and paint the garage, rebuilt the

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[106] *Id*.
[107] *Id*.
[108] Correspondence to Ohio Parole Board from Carrie Michl letter, undated, at 30 - 001, attached as Exhibit 30.
[109] *Id*.
[110] *Id*.
[111] *Id*.
[112] *Id*. at 30 - 002.

steps to the porch and helped us stain the porch and all of the railings. He took such pride in his work."[113]

In November 2018, the Trial Court permitted Tony to travel to Indiana between November 21 and 25 "to spend the Thanksgiving Holiday with family."[114] Tony, Beth, and their family drove to Elkhart, Indiana, to spend the holiday with Tony's first cousin, Kim Braniff and her husband Tim McConnell,[115] who is a retired-police officer, and their family.

Tony remembers going to Indiana when he was four years old to visit his grandmother and aunts on his mother's side. Kim remembers those family visits too. She has "memories of [Tony] and his brother playing with my dad's model train set. I also remember Tony as being tall and he was kind and nice to me."[116] The family continued those visits until 1969 when Tony's grandmother died and the aunts lost touch with each other.

Kim reached out to Tony's mother in the late 1980s to reconnect. It was then that Kim learned Tony was on death row. She began to correspond with Tony and talk to him on the phone. Tony never asked, "Why me?" and he continued to have faith. Kim attended the court hearings in Cleveland in 2014 and 2015. When the judge vacated Tony's convictions and sentences, Kim put up cash to secure Tony's release on bond in 2016.[117]

As Kim reports, "Thanksgiving was wonderful! There were about 25 people for dinner. My mom, Tony's aunt was there. Our Uncle Chuck and Aunt Rosemarie were there. My sisters,

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[113] *Id*.

[114] *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry Nov. 16, 2018), attached as Exhibit 31.

[115] Tim McConnell, crime scene investigator and technician when he was a Military Policeman and with the Elkhart Police Department, reviewed the investigative file in Tony's case. "In [his] opinion, the crime scene was not investigated to its fullest, and leads to the perpetrator were not followed. Also, when reviewing what little evidence there was recovered, it would be impossible to assign guilt onto any one person." Timothy McConnell letter at 32 - 002, March 12, 2022, attached as Exhibit 32.

[116] Correspondence to Ohio Parole Board from Kimberley Braniff letter, March 10, 2022, at 33 - 001, attached as Exhibit 33.

[117] *Id*.

my kids and their spouses, and my grandchildren were all there. Cousins and friends of mine and my husband (some former police officers) wanted to meet Tony. [ ] Tony said the Thanksgiving prayer for our family and carved the turkey. [ ] The entire weekend we just were a big happy family!!!!!"[118]

This is a thumbnail sketch of Tony, the person. The loving husband, doting father, grandfather, and uncle; the true friend who will drop everything to lend a hand and help a person in need; a person of faith. More will be said about the humanity and humility of Anthony Apanovitch at a hearing before this Board.

While Tony was out of custody for two-and-a-half years and living in the community, he lived a trouble-free life. He complied with the rules of the court and his pretrial services officers.[119] It was a successful post-release control plan. During that time, Tony built upon the bonds with family and friends, and established relationships with his new family to hem himself into the fabric of society. Tony did not run away or flee the jurisdiction; he met his obligations to the legal system, just as he had done in October 1984 when he was asked to turn himself in to the police in a couple of hours. Then, he turned himself in as he promised he would. Subsequently, in November 2018 after the Ohio Supreme Court reinstated his convictions and sentences, Tony did not run. Again, he peacefully surrendered to law enforcement officers the next day.

In 1984 Tony trusted the system to get it right and uphold justice. After all this time, the judicial process did not work. As former Justice Herbert Brown observed, "This Board has the authority, even the duty, to right a wrong and correct an injustice that has now lasted almost 38

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[118] *Id*. at 33 - 002.

[119] Cuyahoga County Probation Department Pretrial Status Reports, attached as Exhibit 34. (The defendant has given 47 drug tests and all have been negative. He has been respectful and has followed all the rules of GPS and Court Supervised Release. [ ] The defendant has filed motions for all requests with no issues. He continues to report and abide by the rules of GPS and CSR." *Id*. at 34-001.) Tony had one incident where he tested positive for alcohol and he admitted to it. *Id*. at 34-002.

years."[120] In the words of Diane and Ken McSkimming, "Please do the just thing and right this wrong."[121]

V. CONCLUSION

Exculpatory DNA evidence demonstrates as a matter of scientific and forensic certainty that Tony is not the source of the semen taken from Ms. Flynn's vagina during her autopsy. When that information is considered in the context of the remaining evidentiary picture—properly excluding the false testimony from a detective and the inaccurate and scientifically incomplete trial evidence relating to blood and hair—the outcome is clear: with Tony having spent more than thirty-five years on death row for crimes he did not commit, this Board should recommend that the Ohio Governor grant a pardon or, in the alternative, a commutation of his sentences to time served. To do so would "further the interests of justice and be consistent with the welfare and security of society."[122]

Respectfully Submitted on this 25th day of April, 2022.

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[120] Exhibit 22, at 22 - 002.
[121] Exhibit 23, at 23 - 002.
[122] Ohio Revised Code Section 2967.03

Anthony C. Apanovitch Clemency Petition

Index of Exhibits to Clemency Petition

1. Fourth Petition for Post-Conviction Relief, dated March 21, 2021
2. Correspondence to DeVan and Baich from Meyer, dated Dec. 2, 2008
3. *State v. Apanovitch*, Findings of Fact, Conclusions of Law, and Opinion on Post-Conviction Relief (Ohio Ct. Com. Pl., Cuyahoga Cnty. dated Feb. 12, 2015)
4. *State v. Apanovitch*, 2016-Ohio-2831, 64 N.E.3d 429 (8th Dist.)
5. *State v. Apanovitch,* 155 Ohio St. 3d 358, 2018-Ohio-4744, 121 N.E.3d 351
6. *State v. Apanovitch*, Ruling on Motion for New Trial (Ohio Ct. Com. Pl., Cuyahoga Cnty. dated July 23, 2019)
7. *State v. Apanovitch*, 2020-Ohio-4217 (8th Dist.)
8. *State v. Apanovitch*, Trial Transcript Excerpts
9. Cuyahoga County Coroner Lab Notes, No. 190729, Aug 25, 1984
10. *State v. Apanovitch*, 33 Ohio St. 3d 19, 30 (1987)
11. Affidavit by Barbara Campbell, dated May 20, 1988
12. Cleveland Police Department Supplementary Reports Aug 25 - Sept. 5, 1984
13. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Telephonic Conference Transcript, July 31, 2014)
14. Cleveland Police Department Supplementary Reports Interviews of Anthony Apanovitch dated Aug. 28-30, 1984
15. Report of Autopsy, No. 190729, Aug 25, 1984

16. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Hearing October 14-15, 20140

17. Cuyahoga County Corner Laboratory Notes 2000-2001

18. Correspondence to Prosecutor from Coroner, undated

19. Cuyahoga County Coroner Laboratory Examination Report, #190729 Nov. 11, 2000; Mar 7, 2001

20. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry May 6, 2016)

21. Correspondence to Margarette Ghee, Chair from Justice Craig Wright, dated Feb. 7, 1996

22. Correspondence to Ohio Parle Board from Justice Herbert J. Brown letter, March 11, 2022

23. Correspondence to Ohio Parole Board from Diane and Ken McSkimming, March 11, 2022

24. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry June 13, 2016)

25. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry Aug. 8, 2016)

26. Correspondence to Ohio Parole Board from Dr. Richard Wing letter, March 14, 2022

27. Correspondence to Ohio Parole Board from Father G. David Weikart letter, March 10, 2022

28. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry Nov. 23, 2016)

29. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry May 9, 2017)

30. Correspondence to Ohio Parole Board from Carrie Michl letter, undated

31. *State v. Apanovitch*, No. CR-84-194156 (Ohio Ct. Com. Pl., Cuyahoga Cnty. Journal Entry Nov. 16, 2018)

32. Timothy McConnell letter, March 12, 2022

33. Correspondence to Ohio Parole Board from Kimberley Braniff letter, March 10, 2022

34. Cuyahoga County Probation Department Pretrial Status Reports 2016-2018.