



**OHIO  
JUSTICE  
& POLICY  
CENTER**

215 EAST NINTH STREET  
SUITE 601  
CINCINNATI, OHIO 45202

341 S. THIRD STREET  
SUITE 11  
COLUMBUS, OH 43215

(T) 513-421-1108  
(T) 614-362-1144  
(F) 513-562-3200  
contact@ohiojpc.org  
www.ohiojpc.org

CHIEF EXECUTIVE OFFICER  
Gabriel A. Davis  
Attorney at Law

FOUNDER  
ALPHONSE GERHARDSTEIN

To: Ohio House Criminal Justice Committee  
Fr: Kevin Werner  
Re: Proponent testimony, HB 221  
May 14, 2024

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Chair Abrams, Vice-Chair Williams, Ranking Member Brown and members of the committee, thank you for the opportunity to offer proponent testimony on HB 221, a bill to correct a flaw within Ohio's DNA access law. I want to thank the sponsors of this legislation, Representatives Schmidt and Upchurch. My name is Kevin Werner and I am the policy director at OJPC. We are a nonprofit law firm with offices in Cincinnati and Columbus, whose mission is to promote fair, intelligent, and redemptive criminal justice systems.

To understand the flaw of the DNA law, you need to understand the case of Tony Apanovitch. But first, the relevant part of an Ohio Supreme Court ruling related to the case, and the genesis of the need for this legislation. "We recognize that it may seem unduly formalistic or unfair to foreclose the trial court from considering a postconviction claim that is based on DNA testing that the state itself procured. But it is the prerogative of the General Assembly, not this court, to set the terms by which an offender may pursue postconviction relief."<sup>1</sup>

Forty years ago, Tony Apanovitch was hired to paint part of Mary Anne Flynn's duplex in Cleveland. Soon after, in September 1984, he was arrested in connection with the rape and murder of Ms. Flynn. He was convicted then sentenced to death in January 1985.

Prosecutors withheld and mischaracterized key evidence at trial, but Tony would only learn of the misdeeds years later during his appeals in federal court. At the time of the conviction, DNA testing was not yet developed. Investigators could and did use blood-typing. In this case, investigators concluded that the perpetrator was blood type-A, which Tony Apanovitch was. However, what prosecutors withheld at trial was that Ms. Flynn was also blood type-A.

Years after Mr. Apanovitch had been sentenced to death, a new type of testing method was being developed, and that is DNA testing. Approximately 5 years after the conviction, in 1989, Apanovitch asked for DNA analysis of evidence collected from Ms. Flynn's autopsy. The state responded that evidence had been either lost or destroyed.

Secretly, in 2000 and 2001, the Cuyahoga County Medical Examiner's Office ("CCMEO") tested slides while active litigation in the case was ongoing. The state failed to disclose

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<sup>1</sup> *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744



whether the slides existed or the results of the slides. Apanovitch's legal team invertedly learned of that testing and its results in 2008 during federal court proceedings. Mr. Apanovitch was undisputably excluded as a result of the secret DNA testing.

So what we have is DNA evidence the state secretly tested and failed to disclose to Apanovitch. Testing that proves what Apanovitch has said all along, that he did not commit the crime.

This newly discovered evidence withheld at trial and kept from Apanovitch from 1989 to 2008 is ultimately what led to Apanovitch's exoneration and release from death row in 2016. However, the state appealed and asked the Ohio Supreme Court to overturn Tony Apanovitch's release. For two and a half years, Tony lived as a free man. He did yard work around his home. He drove his grandchildren to school. He got permission to travel to visit family and friends at holidays. His life, despite being wrongfully convicted and incarcerated for more than 30 years, was ordinary in every way.

But in 2018, the Ohio Supreme Court ruled that because the state had conducted the DNA testing that freed him, he was not entitled to benefit from the exonerating results. The day after the ruling was issued, federal law enforcement officials arrested Mr. Apanovitch while he was helping to install a washer and dryer at his daughter's home and brought him back to death row.

The Court's ruling interpreted the DNA access statute to mean a criminal defendant can only benefit from testing when the defendant requests it. The plain language in the statute, as of 2018 and today, envisions the "petitioner" as the defendant who requests DNA testing. The language is silent and not operative when the state requests testing. As Justice Fisher wrote in the Courts opinion, "we recognize that it may seem unduly formalistic or unfair to foreclose the trial court from considering a postconviction claim that is based on DNA testing that the state itself procured. But it is the prerogative of the General Assembly, not this court, to set the terms by which an offender may pursue postconviction relief."

HB 221 fixes the flaw with the DNA testing law so that testing may be requested by either the defendant or at the request or on behalf of the state or any government entity.

The Ohio Justice & Policy Center strongly supports the changes made in HB 221. I would be glad to answer any questions the committee members may have.