

Good afternoon, Chair Abrams, Vice-Chair Williams, Ranking Member Brown, and members of the committee. My name is Dale Baich, and I want to thank the members of the Criminal Justice Committee for affording me the opportunity to speak in support of House Bill No. 221. The Bill amends sections 2953.21 and 2953.23 of the Revised Code to expand the availability of postconviction relief based on DNA testing.

I am a former federal public defender who has represented Anthony Apanovitch since 1991, along with the law firm of Crowell & Moring who has represented Tony since 2012.

Tony sits on death row today even though, following an evidentiary hearing in 2014, a Cuyahoga County trial court judge determined that the only DNA evidence related to Tony's case that has ever been subjected to evidentiary scrutiny was "uncontroverted" and "unequivocal" in *excluding* Tony as a source of the DNA present on the victim at autopsy. Based on that new DNA evidence, Tony was granted a new trial, and released from prison on bond.

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. The only reason Tony is back on death row today is because the Ohio Supreme Court determined that Tony was not entitled to relief under Ohio's post-conviction statute because the relevant DNA testing was conducted secretly by the State, rather than "at the request" of Mr. Apanovitch.

I am here today to ask you to correct that patent injustice by fixing what we believe is an unintended consequence of the literal interpretation of a well-intentioned statute.

The purpose of Ohio Revised Code sections 2953.21 and 2953.23 is to allow "any person" who has been convicted of a criminal offense, including those sentenced to death, and who claims there has been an infringement of his or her rights under the Ohio or United States Constitutions, to file a petition in order to show that the results of DNA testing will establish, by clear and

convincing evidence, his or her actual innocence of the offense or of the aggravating circumstances on which the death penalty was premised.

However, as construed by the Ohio Supreme Court, section 2953.21 in fact does not apply to “any” such persons in contravention of the statute, but, rather, has much more limited application only to those persons who actually make the request for the DNA testing that ultimately proves “actual innocence.” In other words, as construed, the statute does not extend the same protection to persons who are otherwise able to prove their “actual innocence” in circumstances where the DNA testing is undertaken other than at the request of that person. So, for example, if the State requests or undertakes the DNA testing, or if it is undertaken in other cases for other purposes, it is deemed to be a nullity for purposes of section 2953.21, even if that evidence unequivocally demonstrates the person’s actual innocence.

That is precisely what happened to Tony. And I believe the reason we are here today is because that result is clearly unjust, self-evidently makes no sense, and needs to be fixed. Because the purpose of the statute is to allow “any” wrongfully convicted person to establish his or her “actual innocence,” there is no reason why section 2953.21 should be limited only those circumstances where the offender requests the DNA testing. Indeed, as the statute itself indicates, the remedies it affords should extend to “any person,” regardless of how and under what circumstances the exculpatory DNA evidence became known, and regardless of by whom that DNA testing was requested.

Indeed, in Tony’s case, the Ohio Supreme Court itself clearly recognized the absolutely unfair, illogical, and counterintuitive impact of its interpretation of the statute. In paragraph 41 of its 2018 opinion, the Court – in what can only be described as a profound understatement – stated 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.” [*State of Ohio v. Apanovitch*, 2018-Ohio-4744, ¶41 (2018).]

Unfortunately, however, the Court considered its hands to be tied, stating that it was unable to remedy what it correctly noted was the unduly formalistic and unfair application of the literal text chosen by the legislature to establish what it described as a “narrow path” by which an offender may pursue postconviction relief, noting that postconviction rights are granted by statute, and that the legislature’s valid laws control policy preferences. In the court’s words:

...it is the prerogative of the General Assembly, not this court, to set the terms by which an offender may pursue postconviction relief. [Citations omitted]. The legislature in R.C. 2953.23(A) has created a narrow path for an offender to bring an untimely and/or successive postconviction claim based on DNA evidence. Because Apanovitch did not satisfy either of the exceptions provided in R.C. 2953.23(A), the trial court fundamentally lacked jurisdiction to consider his petition or to provide relief under R.C. 2953.21.

In other words, the Court clearly recognized something we believe is quite obvious, that, in certain circumstances, the “unduly formalistic” application of the statute is inherently and obviously “unfair” and needs to be corrected.

That’s the reason we are here today. The General Assembly has the power to correct this clear anomaly emanating from an overly technical interpretation of the statute’s literal text. We simply cannot accept the notion that, when the statute was enacted, given its very purpose, the General Assembly actually intended to allow only some actually innocent persons to obtain relief but not others, based solely on who requested the testing that provided the evidence of that actual innocence. We doubt anyone in this room would support such a profoundly bizarre and irrational notion.

For those reasons, we strongly urge the General Assembly to amend the statute to expressly state that a petition may be filed by any person based on DNA testing, regardless of who requested

or initiated that testing. Such a revision honors the original and laudable purpose of the statute – to allow “any” person to prove their “actual innocence.” Such a revision will ensure that what guides post-conviction relief is the results of DNA testing – the evidence – not the meaningless fact of who asked for or conducted such testing.

Recently, Louis Tobin, the Executive Director of the Ohio Prosecuting Attorneys’ Association, wrote in the *Columbus Dispatch*, “Ohio prosecutors want the death penalty to be fair, accurate, and to guarantee defendants the due process they deserve.” Fixing the statute will ensure that “all” defendants will be treated fairly and will receive and be guaranteed the due process they deserve, and to which they are entitled.

Thank you for your time and consideration. I would be happy to answer any questions from the Committee members.

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