

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 07-1611
: :
Appellant, : On Appeal from the Greene
: County Court of Appeals,
-vs- : Second Appellate District
: :
: Court of Appeals
JOSE A. RIVAS, : Case No. 2005 CA 147
: :
Appellee. : :
:

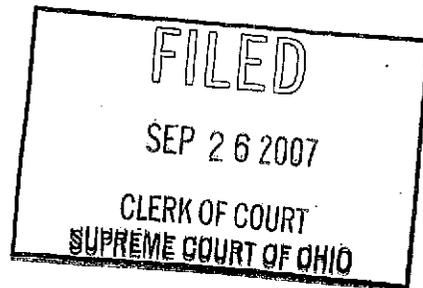
APPELLEE JOSE A. RIVAS' RESPONSE IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**I. EXPLANATION OF WHY NO SUBSTANTIAL CONSTITUTIONAL OR
PUBLIC INTEREST QUESTION IS INVOLVED**

This Court should decline the State's invitation to provide a judicial remedy for a police department's sloppy handling of electronic evidence in an "internet sting" case. The Xenia police failed to properly segregate the electronic evidence relating to its arrest of Appellee-Defendant Jose Rivas from that of its other ongoing criminal investigations. The resulting complications from the police department's refusal to engage in a simple, inexpensive and accepted practice of storing electronic evidence of an alleged crime cannot be remedied at the expense of Mr. Rivas' rights to discovery and a fair trial.

The appeals court correctly held that a trial court's blanket refusal to allow a criminal defendant **any** opportunity to verify the authenticity of the State's documentary evidence purportedly depicting the electronic data contained on the State's computer is reversible error. The resulting precedent is commonsensical and consistent with Crim. R. 16(B) and due process: Where the State seeks to introduce paper printouts in lieu of the original and complete electronic evidence in a "cybercrimes" prosecution, a defendant, consistent with Crim. R. 16(B), is entitled to inspect the electronic evidence to verify that those printouts accurately reflect the electronic data.

The two propositions of law advanced by the State raise no substantial constitutional or public interest issues. The first argument – that a criminal defendant's right to discovery under Crim. R. 16(B) is coextensive with R.C. § 149.43 – was expressly rejected by this Court in *State ex rel. Stegman v. Jackson* (1994), 70 Ohio St.3d 420. The State's alternative suggestion that this Court treat electronic evidence in the same manner as grand jury testimony – meaning a defendant is entitled to it only upon a showing of "particularized need" – ignores the fact that grand jury testimony is subject

to special treatment by virtue of the Rules of Criminal Procedure. Moreover, the “confidential law enforcement investigation” concerns cited by the State would not even exist had the police simply handled the electronic evidence properly.

The State’s second argument – that the paper printouts were properly authenticated at trial by police testimony – addresses an issue that the appeals court never reached. Indeed, the appeals court held this issue to be moot in light of the trial court’s reversible error during the discovery process.

The appeals court’s holding strikes a balance between the State’s security concerns and the Defendant’s procedural and substantive rights in this particular case. The State has set forth no issue of constitutional dimension or of public interest. For the reasons set forth below, the State’s request for jurisdiction should be denied.

II. STATEMENT OF THE CASE AND FACTS

A. Xenia police arrest Mr. Rivas for online conversations with an adult detective allegedly posing as a female.

In January 2005, Xenia police arrested Mr. Rivas for allegedly attempting to arrange a sexual encounter with a “minor female” he had met in an internet chat room. The “minor female” was, in fact, Alonzo Wilson, a 41-year-old male police detective allegedly posing online as a 14-year-old female. (Trial Tr. 21).

Mr. Rivas “met” Det. Wilson in a general AOL chat room and contacted him via instant message (*Id.*). After “chatting” over several hours on two consecutive days – largely back and forth on matters of a sexual nature – the two arranged to meet at the Holiday Inn in Xenia. (Tr. Exhibit 3; Trial Tr. at 40). Det. Wilson testified that he had identified himself as a 14-year-old female. (Trial Tr. 24; Tr. Exhibit 3). Mr. Rivas, however, testified that the individual with whom he had been communicating had

indicated she was 41 years old. (Tr. Exhibit 8; Trial Tr. 90-91, 133-34, 138, 142, 145, 154, 158). Notably, Det. Wilson was 41 years old at the time the “chats” took place. (Trial Tr. 67).

Xenia police arrested Mr. Rivas at the Holiday Inn after he checked into the hotel. (Trial Tr. 56). Mr. Rivas testified that he encountered several men in the hotel elevator, later identified as Det. Wilson and other police officers. (*Id.* at 133). After exchanging pleasantries, the detectives asked Mr. Rivas if he was at the hotel to meet someone. (*Id.*). Mr. Rivas answered yes and stated he was going to the bar to meet a woman. (*Id.*). Det. Wilson asked Mr. Rivas how old the person was that he was meeting to which Mr. Rivas answered “41.” (*Id.* at 133-134). Det. Wilson then grabbed Mr. Rivas’ arm and stated, “No, she’s 14, you’re under arrest.” (*Id.*).

Mr. Rivas consented to police searching his hotel room and his vehicle. (Trial Tr. 72). After he was transported to the police department, he gave a statement to Det. Wilson reiterating that he was meeting a 41-year-old woman at the hotel, not a 14-year-old girl. (Tr. Exhibit 8; Trial Tr. 90-91).

B. The trial court orders the State to allow Mr. Rivas to inspect, and copy the electronic evidence on the police hard drive.

Two weeks after Mr. Rivas was arraigned, defense counsel moved for discovery under Civ. R. 16(B) and for the preservation of all electronic evidence in the possession of Xenia police pertaining to the charges against Mr. Rivas. The trial court granted both of defendant’s motions, ordering that:

Defendant will be given the opportunity to review, photograph, copy or print such items, however, original computer files, spreadsheets, documentation, hardware, software or any other related computer items will be inspected and/or printed or copied or photographed only in the presence of and under the control of Xenia Police Department.

C. The State refuses to comply with the Court's discovery order.

Defense counsel retained a forensic computer expert to examine the electronic evidence of the internet communications between Mr. Rivas and Det. Wilson. In the seven years Xenia police have conducted "internet stings" similar to the one in which it arrested Mr. Rivas, Mr. Rivas was the **first** of the 600-700 individuals criminally charged to request to view the original electronic data. (Trial Tr. 79-80; Motion to Suppress Tr. 6).

Citing non-specific "security" concerns, the State refused to permit Mr. Rivas' expert to make a mirror image or otherwise view or inspect the electronic data. Instead, the State provided defense counsel with paper printouts that it claimed were transcripts of the chats between Det. Wilson and Mr. Rivas and a computer disk containing the same – neither of which contained the original and complete electronic data of the internet conversations or images purportedly depicted in the printouts. (*Id.*; Motion to Suppress Tr. 48-50, 53, 72).

D. The trial court imposes a "catch-22" – holding that Mr. Rivas can only inspect the police's electronic data if he can prove by some other means that the State's paper printouts are different than the electronic data.

Defense counsel filed a motion to compel inspection of the hard drive consistent with the trial court's earlier order. The trial court held a hearing on the motion during which Mr. Rivas presented testimony from police computer expert Mark Vassel explaining that an examination of the electronic data contained on the hard drive was the **only** way to discern whether that the printouts provided by the State were accurate,

reliable and unaltered.¹ (Motion to Suppress Tr. 48-50, 53, 72). The trial court denied the motion, stating “nothing within [Rule 16] that would require the State of Ohio to provide a ‘mirror image’ of its hard drive to the Defendant as a result of criminal discovery in the absence of allegations and some evidence that what has been provided [printouts] is not accurate.”

Mr. Rivas moved the Court to reconsider, stating that Mr. Rivas had, in fact, presented evidence to call the accuracy of the printouts in questions by stating to police that the “female” had identified herself as 41 (not 14). The defense further argued that the **only** complete source of the content of the internet exchanges between Mr. Rivas and Det. Wilson was the electronic data contained on the State’s hard drive. The trial court denied Appellant’s motion.

E. The trial court denies Appellant’s motion to suppress despite testimony establishing that Xenia police compromised the electronic information and failed to maintain the chain of evidence.

Mr. Rivas next moved to suppress the printouts. During a hearing, Det. Wilson conceded that after Mr. Rivas’ arrest, he continued to engage in “chats” with numerous individuals on the same hard drive as that allegedly containing the electronic data of Mr. Rivas’ chats. (Motion to Suppress Tr. 7-8, 81). Det. Wilson also testified that following the arrest, he routinely “booted” the hard drive and acknowledged that he did so knowing that it would alter the electronic information contained in the computer files. (*Id.* at 20). Det. Wilson estimated that he had “booted” the computer at least 50 times between Mr. Rivas’ arrest in January 2005 and the August 2005 hearing date. (*Id.*)

¹ Due to an audio equipment malfunction, no transcript of this hearing is available. In lieu of a transcript, the Parties entered into a Statement of the Evidence pursuant to App. R. 9(C).

Mr. Rivas again offered the testimony of Ofc. Vassel, who explained that police have the same responsibilities to ensure the integrity and reliability of electronic evidence as they do for other physical evidence of a crime. Specifically, once police effect an arrest based upon electronic evidence, the accepted practice is to copy the hard drive as it exists at the time of the arrest onto a clean and sterile external hard drive, then store the external hard drive in an evidence locker just like any other type of evidence. (*Id.* at 37). The result is an exact replica of the complete and original electronic data as it existed at the time of the arrest. Ofc. Vassel testified that this practice is consistent with procedures recommended by the International Association of Computer Investigative Specialists and the United States Secret Service. (*Id.* at 38).

Ofc. Vassel further testified that Det. Wilson's booting of the computer changed anywhere from 2,000 to 10,000 files within the hard drive per boot (multiplied by some 50 bootings), including potentially dates and times. (*Id.*). Ofc. Vassel stated that the **only** way for him to determine if computer information relating to Mr. Rivas' case was damaged or compromised by the booting is to examine the electronic information contained on the hard drive. (*Id.* at 40). Ofc. Vassel testified that in an "internet sting" case such as this, rather than have police prepare a transcript directly, accepted law enforcement practice is to subpoena the internet provider (here, AOL) directly for its information. (*Id.* at 48). When specifically questioned about Xenia police's handling of the hard drive relating to Mr. Rivas' arrest, Ofc. Vassel opined that "the continued usage of that hard drive after the date in which you affect an arrest ruins the ability to consider that as best evidence." (*Id.* at 58). He also stated that Xenia police's continued booting of the computer compromised the chain of custody, noting that "[i]t's the same as

recording over a DUI stop on a tape.” (*Id.*).

Notwithstanding, the trial court denied Mr. Rivas’ motion to suppress, emphasizing that Mr. Rivas had failed to meet the court-imposed burden of establishing that State’s printouts were inaccurate as compared to the electronic data. The trial court noted that Mr. Rivas had failed to enter into evidence his personal computer “which would have given [him] some basis to claim an inaccuracy, if one in fact did exist.” (*Id.*). Notably, neither Xenia police nor the State sought to obtain the computer Mr. Rivas used in connection with his arrest. (Tr. 93).

F. A jury convicts Mr. Rivas at trial.

During the two-day jury trial, the State’s case relied chiefly upon the testimony of Det. Wilson and the paper “transcripts” and images purportedly depicting Mr. Rivas’ “chats” with Det. Wilson. (Tr. Exhibits 1, 2, 3, 4). A jury convicted Mr. Rivas on both counts of the indictment.

G. The appeals court reverses trial court’s discovery ruling.

Mr. Rivas filed a timely notice of appeal raising two assignments of error, specifically that: (1) the trial court erred in denying [Mr. Rivas’] motion to compel inspection and copying of the computer hard drive; and (2) the trial court erred in admitting into evidence at trial the State’s unauthenticated paper printouts of electronic data.

In a decision dated July 13, 2007, the three-judge panel **unanimously** determined that the trial court’s refusal to permit Mr. Rivas any reasonable means of verifying the accuracy of the State’s purported transcripts violated Mr. Rivas’ rights to confrontation and due process. Specifically, the appeals court determined that “forcing a

litigant to rely upon an adverse party's representation that a transcript from a hard drive accurately reflects the information stored on the hard drive, when that accuracy could be directly verified, is inconsistent with due process." (Opinion at 2). The appeals court further found that "[w]here there is direct evidence of a conversation allegedly constituting the crime with which a defendant is charged, we hold that the right to a fair trial * * * includes the right of the defendant to some reasonable means of verifying that a purported transcript of a conversation, prepared from the direct evidence by the adverse party, is accurate and complete." (*Id.* at 7). Applying this analysis, the appeals court sustained Mr. Rivas' first assignment of error (relating to the motion to compel) and held that Mr. Rivas' second assignment of error (relating to the admission of the transcript at trial) was moot. (*Id.*).

III. ARGUMENT

A. Response to Appellant's Proposition of Law No. 1: Crim. R. 16, the Confrontation Clause and due process require that a defendant charged with a "cybercrime" be permitted to discover the original and complete electronic evidence of his alleged crime in the State's possession.

The State's first proposition of law raises three issues: (1) what is the proper standard of review for a trial court's construction of the scope of Crim. R. 16(B); (2) whether evidence is exempt from discovery under Crim. R. 16(B) if it is a "confidential law enforcement record" under R.C. § 149.43(A)(1)(h); and (3) whether, for the purposes of discovery, electronic evidence of a "cybercrime" is subject to the same "particularized need" standard as grand jury testimony.

1. A trial court's decision construing the scope of a procedural rule is reviewed *de novo*.

The State's assertion that the trial court's decision denying Mr. Rivas' motion to

compel is subject to review under an abuse of discretion standard is inaccurate. (Appellant's Memorandum in Support of Jurisdiction at 7). This Court has held that "a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, **so long as such discretion is exercised in line with the rules of evidence.**" *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271 (emphasis added). When an appellate court considers a trial court's application and effect of a rule of a procedural rule, it does so *de novo*. *State v. South* (2005), 162 Ohio App.3d 123, 126; citing *Raceway Video and Bookshop, Inc. v. Cleveland Bd. of Zoning Appeals* (1997), 118 Ohio App.3d 264, 269 ("On matters of law - choice, interpretation, or application - our review is, of course, plenary.")

The trial court's decision denying Mr. Rivas' motion to compel discovery of the State's electronic evidence was based upon its interpretation of the scope of Crim. R. 16(B). Specifically, the trial court determined "nothing within [Rule 16] that would require the State of Ohio to provide a 'mirror image' of its hard drive to the Defendant as a result of criminal discovery in the absence of allegations and some evidence that what has been provided [printouts] is not accurate." Accordingly, the appeals court - and this Court - properly consider the trial court's interpretation of Crim. R. 16(B) *de novo*.

2. A defendant's right to discovery under Crim. R. 16(B) is not coextensive with a citizen's right to obtain records under R.C. § 149.43.

The State effectively **concedes** that the State's computer hard drive containing the electronic data of Mr. Rivas' "chat" falls within the purview of mandatory disclosure under Crim. R. 16(B)(1)(c). Nevertheless, the State attempts to justify its refusal to comply with its duties under Crim. R. 16 by asserting that evidence otherwise

discoverable under Crim. R. 16 is not subject to disclosure if it is a “confidential law enforcement investigatory record” as defined by R.C. § 149.43(A)(1)(h) of the Ohio Public Records Act. (Appellant’s Memorandum at 5). In other words, the State argues that a criminal defendant is only entitled to discover evidence which an ordinary citizen could obtain through a public records request – and nothing more. (*Id.*).

This Court has previously held to the contrary. In *State ex rel. Stegman v. Jackson* (1994), 70 Ohio St.3d 420, 435, the Court held that police investigatory records are excepted from public disclosure “**except as required by Crim. R. 16.**” (emphasis added). Emphasizing the need for “strong enforcement of Crim. R. 16(B)(1)(c) by trial courts in order to effectuate the purposes of the rule and, thereby, serve the ends of justice, judicial economy and avoidance of surprise,” this Court determined that concerns embodied R.C. § 149.43(A)(1)(h) do not outweigh the fundamental rights of discovery and due process embodied in Crim. R. 16(B). *Id.* The Court reaffirmed this holding in *State ex rel. WHIO TV 7* (1997), 77 Ohio St.3d 350, in a decision explaining the distinct purposes of Crim. R. 16 and R.C. § 149.43:

Crim. R. 16(B) **requires** the prosecuting attorney to disclose certain information to the criminal defendant upon the defendant’s request. * * * The purpose behind the Rules of Criminal Procedure “is to remove the element of gamesmanship from a trial.” As such, criminal discovery is solely between the prosecutor and the defendant. The rules governing discovery do not envision a third party’s access to the information exchanged. * * *

By contrast, the purpose of Ohio’s Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy. However, there are certain governmental activities that would be “totally frustrated if conducted openly. Criminal discovery is one of those * * * **We therefore hold that information that a criminal prosecutor has disclosed to a defendant for discovery purposes pursuant to Crim. R. 16 is not thereby subject to release as a “public record” pursuant to R.C.**

149.43. *Id.*, at 354-355 (emphasis added)(internal citations omitted).

Simply put, whether the police computer hard drive meets the definition of a “confidential law enforcement investigatory record” under R.C. § 149.43 has absolutely **no** bearing on whether Mr. Rivas was entitled to discover it pursuant to Crim. R. 16(B)(1)(c). Mr. Rivas did not request the computer hard drive to satisfy his general curiosity as a citizen. Rather, Mr. Rivas sought to inspect the computer hard drive so he could fairly and meaningfully defend himself against the criminal charges against him.

It is important to note that the State’s concerns that the electronic information pertaining to Mr. Rivas’ case would potentially jeopardize ongoing police investigations is directly attributable to Xenia police’s failure to follow accepted police practices in handling electronic information. Ofc. Vassel analogized the police hard drive to a videotape in a cruiser. Xenia police needed only to make a copy of the hard drive at the time of the arrest and preserve it – a simple, inexpensive practice that would have alleviated any problems relating to future investigations. The police’s failure to do so cannot be remedied at the expense of Mr. Rivas’ rights to discovery and a fair trial.

3. Nothing in Crim. R. 16 permits a defendant to show a “particularized need” for electronic evidence.

The State alternatively argues that this Court should create a new rule of criminal procedure: that a defendant can only obtain electronic evidence if, “similar to obtaining a grand jury transcript, [he] show[s] something akin to a particularized need which outweighs law enforcement’s need for confidentiality in order to obtain a copy of it.” (Appellant’s Memorandum at 9).

The State’s suggestion fails to appreciate **why** grand jury testimony is subjected to a heightened standard –that grand jury proceedings are treated differently **because**

of the Rules of Criminal Procedure, not despite them. See Crim. R. 6, Crim. R. 16(B); *State v. Greer* (1981), 66 Ohio St.2d 139, 149-150. Indeed, even grand jury proceedings are subject to **mandatory** disclosure where they include testimony of the defendant or a co-defendant. Crim. R. 16(B)(1)(a)(iii); *Greer*, 66 Ohio St.3d at 150.

The State cannot point to any analogous provision of the Rules of Criminal Procedure that would permit electronic evidence contained on a hard drive to be made available for discovery only upon a showing of particularized need. To the contrary, Crim. R. 16(B) is plain, unambiguous and mandatory. It states a trial court “**shall** order the prosecuting attorney to permit defendant to inspect and copy or photograph * * * tangible objects * * * available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial * * *” (emphasis added).

The Xenia police hard drive containing the electronic data of Mr. Rivas’ communications with Det. Wilson is both tangible and material. It is “capable of being perceived especially by the sense of touch,” and thus, tangible. *Merriam-Webster Collegiate Dictionary*, 11th Ed; see also *South Central Bell Telephone Co. v. Barthelemy* (La. 1994), 643 So.2d 1240, 1248 (electronic data stores on hard drive all tangible objects subject to taxation). Moreover, the hard drive was unquestionably material to the preparation of Mr. Rivas’ defense. The hard drive was the only source of the complete and original electronic data pertaining to Mr. Rivas’ internet communications with Det. Wilson. (Motion to Suppress Tr. 48-50, 53, 72). In fact, this electronic data was the **original source** of the paper printouts offered by State as its chief evidence against Mr. Rivas. (Tr. Exhibits 1, 2, 3, 4). Ofc. Vassel testified that the **only** way to

determine whether those printouts were authentic, accurate and reliable reflections of the actual electronic data was to inspect the hard drive. (Motion to Suppress Tr. 72). Even if this Court would impose a new requirement of “particularized need,” Mr. Rivas would certainly meet that standard.

Because the trial court improperly construed the scope of Crim. R. 16(B)(1)(c), the appeals court’s decision reversing the trial court was procedurally and substantively proper.

B. Response to Appellant’s Proposition of Law No. 2: The appeals court did not reach the issue of whether the State’s documents were properly authenticated at trial.

The State’s second proposition of law asks this Court to address an issue that the appeals court never reached, specifically whether the State’s paper documents of the electronic evidence (Tr. Exhibits 1-4) were properly authenticated at trial. That issue was rendered moot by the appeals court’s decision relating to the motion to compel discovery. (Appellant’s Memorandum at 12). Accordingly, this Court should decline to accept jurisdiction on this proposition.

IV. CONCLUSION

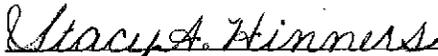
The State’s petition that this Court uphold the trial court’s decision – one that denies a criminal defendant his rights to discovery and a fair trial because of a police department’s sloppy handling of evidence – would require this Court to ignore the Rules of Criminal Evidence and the federal and state constitutions. The appeals court properly rejected the trial court’s all-or-nothing approach in favor of balancing the State’s information security concerns against Mr. Rivas’ fundamental rights to discovery and a fair trial. The practical effect of its decision is fair, reasonable and consistent with Ohio

law. If the State's printouts are consistent with the electronic evidence, then that fact will be conclusively established; if the evidence is inconsistent, however, then Mr. Rivas will have the opportunity to discovery that information and utilize it in his defense.

Simply put, the State has set forth no issue of constitutional or public interest. Accordingly, Mr. Rivas respectfully requests that the State's petition for jurisdiction be denied.

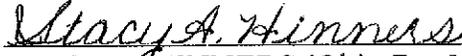
Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Response was sent via facsimile and ordinary U.S. mail to counsel of record for appellant, Stephen K. Haller and Elizabeth A. Ellis, Greene County Prosecutor's Office, 61 Green Street, Second Floor, Xenia, OH 45385, on this 25th day of September 2007.


STACY A. HINNERS (Ohio Bar No. 0076458)